

No. 12766

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United States  
Court of Appeals  
for the Ninth Circuit.

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JOHN URQUHART BIRNIE, an Individual Doing Business as Birnie Electric Company, and MASSACHUSETTS BONDING AND INSURANCE COMPANY, a Corporation,

Appellants,

vs.

THE PERMANENTE METALS CORPORATION, a Corporation, and UNITED STATES MARITIME COMMISSION,

Appellees.

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Transcript of Record  
In Three Volumes  
Volume I  
(Pages 1 to 288)

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Appeal from the United States District Court,  
Northern District of California,  
Southern Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court, for the Northern District of California, Southern Division

No. 26215S:

THE PERMANENTE METALS CORPORATION, a Corporation,

Plaintiff,

vs.

JOHN URQUHART BIRNIE, an Individual Doing Business as BIRNIE ELECTRIC COMPANY, MASSACHUSETTS BONDING AND INSURANCE COMPANY, a Corporation, FIRST DOE, SECOND DOE, THIRD DOE, FIRST DOE COMPANY, SECOND DOE COMPANY, THIRD DOE COMPANY, Defendants.

COMPLAINT FOR DAMAGES FOR BREACH OF CONTRACT, FOR GOODS AND SERVICES, AND AGAINST PRINCIPAL AND SURETY UPON CONTRACT PERFORMANCE BOND

Plaintiff complains of defendants above named, and for a First Cause of Action alleges that:

I.

At all times herein mentioned, plaintiff was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and duly qualified and doing business in the State of California, with its principal place of business in the Northern District of California.

## II.

At all times herein mentioned, defendant, John Urquhart Birnie, also sometimes known and referred to as John U. Birnie, was, and now is, a resident of the State of California, and was, and is, doing business in the Northern District of California and elsewhere as Birnie Electric Company.

## III.

At all times herein mentioned, Massachusetts Bonding and Insurance Company, a corporation, was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Massachusetts, and duly qualified and doing business in the State of California, and particularly in the Northern District of California.

## IV.

First Doe, Second Doe, Third Doe, First Doe Company, Second Doe Company and Third Doe Company are the fictitious names of defendants whose true names are unknown to plaintiff, and plaintiff asks that when such true names are discovered, that this Complaint may be amended by inserting such true names in the place and stead of such fictitious names, together with appropriate charging allegations.

## V.

The amount involved in this litigation exceeds, exclusive of interest and costs, the sum of \$3,000.00

## VI.

On or about May 29, 1944, in Contra Costa County, California, in the Northern District of California, plaintiff and defendant, John Urquhart Birnie, doing business as Birnie Electric Company, made and entered into a certain contract in writing, bearing date of May 29, 1944, designated Vessels Subcontract No. VS-14, under United States Maritime Commission Contract No. MCo-15762. Said contract was subject to the approval of the United States Maritime Commission, and was duly approved in writing by the United States Maritime Commission on or about August 3, 1944, in Contra Costa County, California, in said Northern District of California. A true copy of said contract is attached hereto, marked "Exhibit A," and by reference made a part hereof as though fully set forth herein.

## VII.

On or about August 10, 1944, plaintiff and said defendant duly executed an Addendum to said contract designated as Addendum No. 1 to Subcontract No. VS-14. Said Addendum No. 1 was subject to the approval of the United States Maritime Commission, and was duly approved in writing by the United States Maritime Commission on or about September 19, 1944. A true copy of said Addendum No. 1 is attached hereto, marked "Exhibit B," and by reference made a part hereof as though fully set forth herein.

## VIII.

On or about October 19, 1944, plaintiff and said defendant duly executed an Addendum to said contract designated as Addendum No. 2 to Subcontract No. VS-14. Said Addendum No. 2 was subject to the approval of the United States Maritime Commission, and was duly approved in writing by the United States Maritime Commission on or about October 28, 1944. A true copy of said Addendum No. 2 is attached hereto, marked "Exhibit C," and by reference made a part hereof as though fully set forth herein.

## IX.

On or about November 20, 1944, plaintiff and said defendant duly executed an Addendum to said contract, designated as Addendum No. 3 to Subcontract No. VS-14. Said Addendum No. 3 was subject to the approval of the United States Maritime Commission, and was duly approved in writing by the United States Maritime Commission on or about February 27, 1945. A true copy of said Addendum No. 3 is attached hereto, marked "Exhibit D," and by reference made a part hereof as though fully set forth herein.

## X.

Plaintiff has fully and faithfully done and performed all acts and things on its part to be done or performed under said contract and the said Addenda thereto.

## XI.

Said contract contained a Special Provision No. 4, to which reference is hereby made, whereby said defendant agreed to account for and pay to plaintiff profits realized by said defendant in the performance of the contract as determined by the United States Maritime Commission to be in excess of 10% of the total contract price, such amount so paid to become the sole property of the United States Maritime Commission.

## XII.

The work to be performed by said defendant under said contract and the Addenda thereto was completed on or before March 26, 1946. After the completion of such work, and on or about March 26, 1946, the United States Maritime Commission determined the amount of such excess profits under Special Provision No. 4, which said defendant agreed to pay to plaintiff for the benefit of the United States Maritime Commission, to be the sum of \$190,490.96, as follows:

Stated Contract Price .....	\$430,963.95
Less, Final Contract Price, including Profit .....	240,472.99

---

Profits in Excess of 10% of Stated Contract Price .....	\$190,490.96
--	--------------

## XIII.

Plaintiff paid to said defendant prior to such determination by the United States Maritime Commis-



sion of the amount of excess profits, as aforesaid, the total sum of \$389,419.56, which total sum was \$148,946.57 in excess of said final contract price of \$240,472.99 as determined by the United States Maritime Commission, as aforesaid.

#### XIV.

On or about June 19, 1946, plaintiff made a written demand upon said defendant for the payment to plaintiff of the said sum of \$148,946.57, but said defendant has failed and refused, and still fails and refuses, to pay said sum, or any part thereof, to plaintiff, and there is now due, owing and unpaid from said defendant to plaintiff, pursuant to said Contract No. VS-14 and the Addenda thereto, the sum of \$148,946.57.

Wherefore, plaintiff prays judgment against said defendant as hereinafter requested.

For a Second and Separate Cause of Action, plaintiff alleges that:

#### I.

Plaintiff repleads all of the allegations contained in Paragraphs I to XIV, inclusive, of plaintiff's First Cause of Action, to which reference is hereby made, and the same are hereby incorporated and referred to in this Second Cause of Action and made a part hereof as though the same were fully set forth herein.

#### II.

On or about July 31, 1944, defendant, John Urqu-

hart Birnie, doing business as Birnie Electric Company, as principal, and defendant, Massachusetts Bonding and Insurance Company, as surety, for a valuable consideration, made, executed and delivered to plaintiff a certain Performance Bond No. C-28504, in favor of "The Permanente Metals Corporation and the United States of America represented by the U. S. Maritime Commission as their interest may appear," in the sum of \$44,048.45 to secure the faithful performance by defendant John Urquhart Birnie, doing business as Birnie Electric Company, of said Contract No. VS-14, and all modifications and extensions thereof. Said Performance Bond was, and is, by its terms binding upon said principal and surety, jointly and severally, and has been at all times since said date, and now is, in full force and effect. A true copy of said Performance Bond is attached hereto, marked "Exhibit E," and by reference made a part hereof as though fully set forth herein.

### III.

On or about August 28, 1944, defendant, John Urquhart Birnie, doing business as Birnie Electric Company, as principal, and defendant, Massachusetts Bonding and Insurance Company, as surety, for a valuable consideration, made, executed and delivered to plaintiff a certain Performance Bond, No. C-28589, in favor of "The Permanente Metals Corporation and the United States of America represented by the U. S. Maritime Commission as their interest may appear," in the sum of \$150,754.22, to

further secure the faithful performance by defendant, John Urquhart Birnie, doing business as Birnie Electric Company, of said Contract No. VS-14 and Addendum No. 1 thereto, and all modifications and extensions thereof. Said Performance Bond was and is, by its terms binding upon said principal and surety, jointly and severally, and has been at all times since said date, and now is, in full force and effect. A true copy of said Performance Bond is attached hereto, marked "Exhibit F," and by reference made a part hereof as though fully set forth herein.

#### IV.

On or about October 31, 1944, defendant, Massachusetts Bonding and Insurance Company, for valuable consideration, made, executed and delivered to plaintiff an Endorsement to be attached to and form a part of said Performance Bond No. C-28504 and said Performance Bond No. C-2858, whereby the coverage of each of said Performance Bonds was, and is, increased by \$25,000.00 to further secure the faithful performance by defendant, John Urquhart Birnie, doing business as Birnie Electric Company, of said Contract VS-14 and the Addendum thereto. Said Endorsement has been at all times since said date, and now is, in full force and effect. A true copy of said Endorsement is attached hereto, marked "Exhibit G," and by reference made a part hereof as though fully set forth herein.

#### V.

On or about November 9, 1944, defendant, John Urquhart Birnie, doing business as Birnie Electric



Company, as principal, and defendant, Massachusetts Bonding and Insurance Company, as surety, for a valuable consideration, made, executed and delivered to plaintiff a certain unnumbered Performance Bond in favor of "The Permanente Metals Corporation and the United States of America represented by the U. S. Maritime Commission as their interest may appear," in the sum of \$87,566.38, to secure the faithful performance by defendant, John Urquhart Birnie, doing business as Birnie Electric Company, of said Contract No. VS-14, and all modifications and extensions thereof. Said Performance Bond was, and is, by its terms binding upon said principal and said surety, jointly and severally, and has been at all times since said date, and now is, in full force and effect. A true copy of said Performance Bond is attached hereto, marked "Exhibit H," and by reference made a part hereof as though fully set forth herein.

Wherefore, plaintiff prays judgment against said defendants as hereinafter requested.

For a Third and Separate Cause of Action, Plaintiff alleges that:

I.

Plaintiff repleads all of the allegations contained in Paragraphs I, II and IV of plaintiff's First Cause of Action, to which reference is hereby made, and the same are hereby incorporated and referred to in this Third Cause of Action and made a part hereof as though the same were fully set forth herein.

## II.

Within two years last past, defendant, John Urquhart Birnie, doing business as Birnie Electric Company, became indebted to plaintiff in the sum of \$1,545.66 for the agreed and reasonable value of goods furnished and services rendered by plaintiff to said defendant at said defendant's special instance and request in the County of Contra Costa, in the Northern District of California.

## III.

Plaintiff has made demands upon said defendant for the payment of said sum of \$1,545.66, but said defendant has failed and refused to pay the same to plaintiff, and the said sum is now due, owing and unpaid.

Wherefore, plaintiff prays judgment against said defendants as hereinafter requested.

1. Against defendant, John Urquhart Birnie, doing business as Birnie Electric Company, for the sum of \$148,946.57, mentioned in the First Cause of Action, together with interest upon said sum until paid, as allowed by law.

2. Against defendant, John Urquhart Birnie, doing business as Birnie Electric Company, and defendant, Massachusetts Bonding and Insurance Company, jointly and severally, for the sum of \$148,946.57, mentioned in the said Second Cause of Action, together with interest upon said sum until paid, as allowed by law.

3. Against defendant, John Urquhart Birnie, doing business as Birnie Electric Company, for the sum of \$1,545.66, mentioned in said Third Cause of Action, together with interest upon said sum until paid, as allowed by law.

4. For costs of suit, and for such other and further relief as may be proper.

/s/ BRUCE WALKUP,  
/s/ WILLIS S. SLUSSER,

THELEN, MARRIN,  
JOHNSON & BRIDGES,  
Attorneys for Plaintiff.

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EXHIBIT A

The Permanente Metals Corporation

(Shipyard Number Two)

Post Office Box 1072

Richmond, California

United States Maritime Commission

Contract No. MCc-15762

Vessels Subcontract No. VS-14

Date: May 29, 1944

The Permanente Metals Corporation, hereinafter referred to as Contractor, and Birnie Electric Company, with offices located at 816 West 5th Street, Los Angeles, California, hereinafter referred to as Subcontractor, hereby agree that the following work shall be performed for the compensation and upon the terms and conditions hereinafter set forth on the

face of this Subcontract, and including Articles 1 through 44 of the Terms and Conditions attached to and made a part of this Subcontract;

### Work to Be Performed:

Article 1. Degaussing—Subcontractor shall furnish all supervision, labor, equipment and materials, except such as may be furnished by the United States Navy necessary completely to fabricate and install the Degaussing System, including the degaussing troughs, covers, straps, cables, kick pipes bulkhead penetrations, junction boxes, control panels and wiring.

Article 2. Radar—Subcontractor shall furnish all supervision, labor, equipment and materials not furnished by Contractor or the United States Navy, completely to install the Radar System as outlined by the United States Navy, except the pulling and strapping of cables that may run in the main cable ways.

Article 3. Voice Tube—Subcontractor shall furnish all supervision, labor, equipment and material not furnished by Contractor or the United States Navy, necessary completely to make and install all straps and hangers required throughout the Voice Tube System and shall mount all equipment furnished with the Voice Tube.

Article 4. Mechanical Telegraph—Subcontractor shall furnish all supervision, labor, equipment and materials not furnished by Contractor or the United States Navy necessary completely to make and i-



stall all straps and hangers required throughout the Mechanical Telegraph System, and mount all equipment furnished for the Mechanical Telegraph System.

Article 5. Mechanical Wireways—Subcontractor shall furnish all supervision, labor, equipment, machinery, tools of every description, and materials, not furnished by Contractor or the United States Navy, necessary completely to fabricate the wireways and install same on the vessel; said fabricating to be done at Subcontractor's plant.

#### Plans, Drawings and/or Specifications:

Subcontractor shall perform said work in accordance with drawings and/or specifications herein mentioned under the numbers corresponding to the foregoing articles under "Work to Be Performed."

Article 1. S81-1, S81-2 and S81-3

Article 2. S67-0-6 and S67-0-7

Article 3. S65-4-3, S65-4-3-3 and S65-4-3-4

Article 4. S65-4-8-1, S65-4-8-2,  
S65-4-8-3 and S-65-4-8

Article 5. S62-2-9, S62-2-9-1,  
S62-2-9-2 and S62-2-9-3

The Degaussing System shall be for the Single Screw Cargo Vessel—U.S.M.C. Design VC2-S-AP5, and Certificate of Acceptance by the United States Navy shall be required prior to delivery of each vessel. Detailed plans and working drawings shall be prepared by Subcontractor and must have ap-

proval of Contractor, United States Maritime Commission and the United States Navy prior to fabrication and installation.

All installations of equipment shall be installed in accordance with the methods outlined by G.G.S. Plan No. V. 1665—S1-7-1, latest alterations. Minor changes shall be made by Subcontractor at no expense to Contractor.

#### Location of Work:

All installation work shall be performed at the Contractor's Shipyard No. 2, Richmond, California. However, Subcontractor may do certain fabricating at its own plant.

#### Items to Be Furnished by Contractor:

Contractor shall install the cable from the De gaussing Control Panel to the Wheelhouse and provide the penetration at the Binnacle at the required locations and support said cable.

All raw materials required for the installation of the Radar, Voice Tube and Mechanical Telegraph shall be furnished by Contractor.

Contractor shall provide space for the storage of materials required for the work aforesaid together with electric power, light, water and air service, also crane service and such transportation as may be necessary to haul wire reels and heavy parts of equipment within the aforesaid shipyard.

#### Work to Commence:

Subcontractor shall commence the aforesaid work as directed by Contractor.

# Work to Be Completed:

Subcontractor shall perform said work in such manner as to keep abreast of Contractor's construction program.

The schedule of estimated deliveries of the five vessels upon which Subcontractor is to perform said work is as follows: July 29, 1944; August 26, 1944; September 2, 1944; September 9, 1944; and September 16, 1944.

# Compensation:

Compensation for the performance of said work shall be paid to Subcontractor as follows, subject to the Terms and Conditions herein covering payments:

	Per Vessel
Article 1. For completion of Degaussing System.....	\$ 7,725.00
Article 2. For completion of Radar System .....	2,983.00
Article 3. For completion of Voice Tube System.....	666.00
Article 4. For completion of Mechanical Telegraph....	2,796.00
Article 5. For completion of Mechanical Wireways ....	3,333.00
<hr/>	
Sub total .....	\$17,503.00
Cost of bond at the rate of \$6.65 per Thousand Dollars .....	116.38
<hr/>	
Grand total .....	\$17,619.38

It is understood by the Contractor that the Subcontractor has previously submitted bids on certain items of work in connection with the wiring of the Guns and Gun Control System, Gyros and Radios and that the Subcontractor has performed certain of this work on hull No. 552. It is hereby agreed that the Subcontractor shall be paid the following percentages of his bid price for such work:

Item	Per Cent of Work Completed	Subcontractor's Bid Price	Amount Payable
Guns .....	2%	\$2,129.00	\$ 42.58
Gun Control .....	2%	4,259.00	85.18
Gyro .....	4%	2,818.00	112.72
Radio .....	3%	4,541.00	136.23

Bonds: Required (See Article 23).

Liquidated Damages: None specified.

### Special Provisions:

1. Subcontractor shall perform the aforesaid work on Hulls Nos. 552 to 556, inclusive, a total of five (5) vessels under Prime Contract No. MCc-15762.

2. Contractor shall pay Subcontractor by monthly payments; said payments shall be based upon 90% of the sum due on progress estimates made by the Subcontractor and approved by the Contractor. Contractor shall withhold ten per cent (10%) of such sums pending final determination of profits under this subcontract, as hereinafter provided.

3. Outstanding amounts, if any, due at the completion of this subcontract are payable fifteen (15) days after final determination of such amounts as provided in this subcontract.

4. Report of Cost—Excess Profits: The Subcontractor agrees to account for and pay to the Contractor certain profits derived under this contract and for such purposes agrees:

(a) To make a report under oath to the Com



mission care of the Contractor upon completion of this contract, setting forth in the form prescribed by the Commission the total contract price, the total cost of performing the contract, the amount of Subcontractor's overhead charged to such cost, the net profits and the percentage such net profit bears to the contract price, and such other information as the Commission shall prescribe;

(b) To pay to the Contractor profit as shall be determined by the Commission in excess of ten (10) per cent of the total contract price which amount shall become the sole property of the commission;

(c) To make no subdivisions of any contract or subcontract for the same article or articles for the purpose of evading the provisions of this Article; and any subdivision of any contract or subcontract involving an amount in excess of \$10,000 shall be subject to the conditions prescribed in this article; provided that agreements for the purchase of material and/or for the rental of equipment shall not be considered as subdivisions of any contract or subcontract within the meaning of this section;

(d) That the books, files and all other records of the Subcontractor or any holding, subsidiary, affiliated, or associated company, shall at all times be subject to inspection and audit by any person designated by the Contractor or the Commission, and the premises shall at all times be subject to inspection by the agents of the Commission and Contractor.

It is further understood and agreed that the Commission shall prescribe the method of determining the Subcontractor's profits: Provided, that, in com-

puting such profits no salary of more than \$25,000 per year to any individual shall be considered as a part of the cost and no cost will be allowed which, in the judgment of the Commission, is not fair and just or is in excess of a reasonable market price for commodities or goods or services purchased or charged.

Although the accounting for profits and payments to be made under the provisions of this Article shall be in accordance with the provisions of Section 505 (b) of the Merchant Marine Act, 1936, as amended and the regulations of the Commission issued pursuant thereto, the losses incurred in connection with the performance of this contract shall not be used in connection with computing profits derived under any other contracts that the Subcontractor may have with the Contractor or Commission and losses incurred in connection with such other contracts shall not be used in connection with computing profits derived under this contract, it being understood and agreed that the obligation of the Subcontractor to make payments under this Article is contractual and that such payments shall in effect constitute a reduction of the amount of the contract price which the Contractor is entitled to retain.

5. The following changes shall be made in the following articles of the general Terms and Conditions:

(a) The last sentence of Article A, commencing "If partial termination of this order . . ." shall be deleted from said Terms and Conditions.

(b) In the last sentence of Article 17 B (2), the following language shall be added after the words "shall exclude" to wit: "Any cost for interest on borrowings, and shall exclude . . ."

(c) The last sentence of Paragraph 17 C shall be deleted and the following sentences substituted in lieu thereof: "As directed by the Contractor, the Subcontractor will transfer and make delivery of such articles, materials, work in progress or other things not so retained or sold. Appropriate adjustment will be made for delivery costs or savings therein."

This Subcontract is subject to the approval of the United States Maritime Commission.

THE PERMANENTE METALS  
CORPORATION,  
Contractor.

By /s/ T. A. BEDFORD,  
Assistant General Manager.

BIRNIE ELECTRIC  
COMPANY,  
Subcontractor.

By /s/ JOHN URQUHART BIRNIE,  
Sole Proprietor.

Approved 8/3/45:

THE UNITED STATES  
MARITIME COMMISSION,

By /s/ C. V. FISHER,  
Material Controller.

Approved as to Form:

THE PERMANENTE METALS  
CORPORATION,

By /s/ LUCAS A. POWER,  
Legal Department.

Revision No. 2 5-43

Terms and Conditions

Article 1. Items to Be Supplied by Contractor: Contractor agrees to supply, without charge to Subcontractor, at the site of work for use by Subcontractor in connection with the performance of the work under this Subcontract, the items specified on the face of this subcontract.

Article 2. Items to Be Supplied by Subcontractor: Subcontractor agrees to supply at the location where the work is to be performed at no charge other than the compensation provided on the face of this Subcontract, everything necessary for the complete performance of this Subcontract, including all labor, tools implements, equipment, machinery and materials, except such as is to be supplied by Contractor as described on the face of this Subcontract.

Should the Subcontractor at any time during the performance of this Subcontract be delayed in the performance of the work hereunder by reason of lack of materials or equipment to be furnished by Subcontractor, the Contractor reserves the right upon written notice to Subcontractor to supply such materials or equipment to the Subcontractor, and the cost of such materials and reasonable rental for the equipment shall be deducted from the amounts becoming due to Subcontractor hereunder.

Article 3. No Representations to Subcontractor: It is distinctly understood and declared by the Subcontractor that this Subcontract is made for the consideration set forth on the face of this Subcontract and that the Subcontractor has by careful examination satisfied himself as to the nature and location of the



work to be performed, the conformation of the ground, the character, quality and quantity of the materials to be encountered, the character of equipment and facilities needed preliminary to and during the prosecution of the work, the general and local conditions, and as to any and all other matters and conditions which can in any way affect the work under this Subcontract. No verbal agreement or conversation with any officer, agent or employee of the Contractor either before or after the execution of this Subcontract, shall affect or modify any of the terms or obligations herein contained.

Article 4. Municipal Fees and Deposits: Subcontractor agrees to secure all necessary permits in connection with the performance of the work under this Subcontract and to pay all municipal and other fees in connection therewith, and agrees to furnish at its expense any and all bonds and cash or other deposits required by law or required by any lawful body having the right to make demand therefor.

Article 5. Compliance With Applicable Governmental Statutes and Regulations: Subcontractor, its employees and all others acting under its direction or control, shall at all times observe and comply with, in so far as they may be applicable, any and all laws, ordinances, statutes, rules and regulations of the United States and of the State of California and of their executive and administrative agencies and of any and all other governmental agencies having any jurisdiction over the work to be done hereunder, and shall also observe and comply with any and all rules and regulations of the Contractor pertaining to the conduct of work at the shipyard site.

Article 6. Plans, Drawings and/or Specifications: Subcontractor agrees fully to perform this Subcontract to the entire satisfaction of Contractor and in strict conformance with any plans, drawings and/or specifications referred to or incorporated in this Subcontract, or in any amendments or additions made to this Subcontract, and also in conformance with any plans, drawings and/or specifications in effect at the date of this Subcontract, required by any lawful body having the right to demand that said work should be performed in the manner specified by such body.

Article 7. Additional Drawings: Contractor, in its discretion, may supply Subcontractor with such additional plans, drawings, specifications and/or explanations as may be necessary to further detail and illustrate the work to be done, and Subcontractor agrees to conform thereto. Subcontractor, where Contractor deems necessary, will furnish Contractor with shop and/or work drawings showing details of work to be performed.

Article 8. Deviation From Plans, Drawings, and/or Specifications: The Contractor may at any time by a written order and without notice to Subcontractor's sureties make changes in the plans, drawings and/or specifications of this Subcontract and within the general scope thereof. If such changes cause an increase or decrease in the compensation due under this Subcon-

tract and/or in the time required for its performance an adjustment shall be made and the Subcontract shall be modified in writing accordingly. If the Subcontractor does not approve of the adjustment in the amount due under this Subcontract and/or in the time required for its performance, he shall so notify Contractor within ten (10) days of the receipt by Subcontractor of notice of the amount of the proposed adjustment. The work shall, nevertheless, proceed in accordance with the order for changes and the adjustment of compensation and time shall be subsequently settled by negotiations between the parties. In determining the adjustment of compensation, unit prices appearing on the face of this Subcontract will govern in so far as applicable to the extra work and/or changes.

Subcontractor shall not be entitled to any payment for extra work and/or changes performed in connection with the work provided for herein, unless such work shall have been authorized in writing by Contractor and approved by the United States Maritime Commission.

Article 9. Records, Accounts and Audits: Subcontractor agrees to keep one complete set of records and books of account on a recognized cost accounting basis satisfactory to the United States Maritime Commission and Contractor, showing the actual costs of Subcontractor of all items of labor, materials, equipment, supplies, services and other expenditures, of whatever nature, made pursuant to the provisions of this Subcontract.

The United States Maritime Commission and Contractor shall at all times be afforded proper facilities for the inspection and/or auditing of all books, correspondence, records, instructions, plans, drawings, specifications, vouchers and memoranda of every description, of Subcontractor pertaining to the work hereunder.

Article 10. Subcontractor Not Agent of Contractor: In the execution of the work provided for herein Subcontractor shall operate as an independent Contractor and not as the agent of Contractor.

Article 11. Superintendence: Subcontractor agrees to designate, appoint and maintain a competent Superintendent who, on behalf of Subcontractor, shall have complete charge of all work under this Subcontract. Subcontractor shall promptly advise Contractor in writing, giving the name, address and telephone number (day and night) of such designated Superintendent and of any changes from time to time in such superintendence.

Article 12. Performance of Work: Subcontractor agrees to proceed with the work to be performed under this Subcontract and each and every part and detail thereof, in the best and most workmanlike manner by qualified, careful and efficient worker and agrees to do the several parts thereof at such time and in such order as Contractor may direct and agrees to finish such work in strict conformance with said plans, drawings and/or specifications, or any changes, modifications or amplifications thereof made by Contractor.

If the work done under this Subcontract proves to be defective as to material and/or workmanship furnished by the Subcontractor, the Contractor shall notify the Subcontractor and may at its discretion give the Subcontractor a reasonable opportunity to correct or remedy such defects by repair or replacement or may reject such defective materials and/or workmanship and replace them at the expense of the Subcontractor and deduce the amount of such expense from any amounts due under this Subcontract. In no event shall Contractor be precluded from pursuing any other remedy which may be available against Subcontractor for such defective material or workmanship.

**Article 13. Hours of work:**

A. If the work to be carried on under this Subcontract is specified on the face hereof as Facilities or Maintenance A (not an integral part of Contractor's vessels construction schedule), then:

Subcontractor shall carry on his work six (6) days per week, legal holidays excepted, and one shift per day, not to exceed ten (10) hours for such shift. If, in order to complete the work provided by this Subcontract within the time specified for completion, it is necessary for Subcontractor's operations to be carried on more than six (6) days per week, more than one shift per day, and/or in excess of ten (10) hours per shift, no additional compensation shall be paid to Subcontractor for such work.

If, however, Contractor for his own purposes requires that Subcontractor's operations be carried on more than six (6) days per week, or on legal holidays and/or more than one shift per day, and/or in excess of ten (10) hours per shift, an Extra Work Order covering the additional wages, taxes, and compensation insurance shall be issued subject to the approval of the United States Maritime Commission.

B. If the work to be carried on under this Subcontract is specified on the face hereof as Vessels or Maintenance B (an integral part of Contractor's vessels construction schedule), then:

When necessary to keep apace with Contractor's progress under Contractor's vessels construction schedule, Subcontractor's operations hereunder shall be carried on seven (7) days per week including Saturdays, Sundays, and/or Holidays, on a one (1), two (2), and/or three (3) shift basis, and/or in excess of eight (8) hours per shift. No additional compensation shall be paid because of the necessity of performing work at other than the regular hours of work, which are defined as the hours during which no overtime or shift premium need be paid.

**Article 14. Inspection:** Subcontractor agrees that representatives of the United States Maritime Commission or of the Contractor, or any person appointed by Contractor or by the United States Maritime Commission, will be permitted to visit and inspect said work, or any part thereof, at all times and places during the progress of the work, and Subcontractor agrees to provide sufficient, safe and proper facilities for such inspection. All mate-



rials and workmanship supplied in the performance of this Subcontract shall be subject to inspection and tests and approval by the Contractor at any and all times during the manufacture or construction and at any and all places where such manufacture or construction is carried on. The Contractor shall have the right to reject materials and workmanship determined by it to be defective, and require correction and replacement thereof, at no expense to the Contractor.

Article 15. Delays and Extensions: The time during which Subcontractor is delayed in the performance of work hereunder by the acts of omission or commission of Contractor or of the employees or agents of the Contractor, or by the acts of God, or by the elements which Subcontractor could not reasonably foresee and provide against, or by other causes beyond Subcontractor's control, including without limitation shortage of materials or equipment, (provided that the Subcontractor has ordered all necessary materials and equipment at the proper times and used reasonable effort to obtain delivery of such materials and equipment at the time and in the order required to carry on the work properly) strikes, boycotts, or like obstructive action by employees or labor organizations, or lockouts, or other defensive action by other employers, whether general or individual, or by organization of other employees, shall be added to the aforesaid time of completion of said work, provided Subcontractor gives prompt written notice to the Contractor of the event causing such delay.

Subcontractor shall not be entitled to, and does hereby waive any and all damages other than those compensable under Article 16, entitled "Suspension for Convenience," which it may suffer by reason of Contractor hindering or delaying Subcontractor in the progress of said work, or any portion thereof.

Article 16. Suspension for Convenience: The Contractor for his own convenience or for that of the United States Maritime Commission may suspend this Subcontract in whole or in part at any time by one day's written or telegraphic notice to the Subcontractor. Such notice shall state the extent and the effective date of such suspension, and on the effective date thereof Subcontractor shall promptly suspend such work to the extent specified and during the period of such suspension shall properly care for and protect all work and materials, housing and equipment or hand for construction under this Subcontract. Subcontractor also shall promptly supply the Contractor copies of all outstanding orders for materials, equipment and services, and shall take such action relative to such orders as may be directed by the Contractor. If the performance of the work is thus suspended, Subcontractor shall be entitled to be reimbursed for all additional expenses incurred by reason of such suspension as agreed upon by Contractor and Subcontractor and approved by the United States Maritime Commission.



## Article 17. Termination for Convenience:

A. The Contractor may, for his own convenience or that of the United States Maritime Commission terminate work under this Subcontract in whole or in part at any time by one day's written or telegraphic notice to the Subcontractor. Such notice shall state the extent and effective date of such termination; and on the effective date thereof the Subcontractor will, as and to the extent directed by the Contractor, stop work under this Subcontract and the placement of further orders or subcontracts hereunder, terminate work under orders and subcontracts outstanding hereunder, and take any necessary action to protect property in the Subcontractor's possession in which the Contractor has or may acquire an interest. If partial termination of this order results in any increase in the unit cost of articles or services to be completed thereafter, the Subcontractor may promptly request, and the Contractor will make an appropriate, fair and reasonable adjustment in the price of such articles or services.

B. If the parties cannot agree by negotiation within a reasonable time upon the amount of fair compensation to the Subcontractor for such termination, the Contractor in addition to making prompt payment for articles delivered or services rendered prior to the effective date of termination will pay to the Subcontractor the following amounts without duplication:

- (1) The contract price for all articles or services which have been completed in accordance with this Subcontract and not previously paid for;
- (2) (i) The actual costs incurred by the Subcontractor which are properly allocable or apportionable under recognized commercial accounting practices to the terminated portion of this Subcontract including the cost of discharging liabilities which are so allocable or apportionable, and (ii) a sum equal to 2% of the part of such costs representing the costs of articles or materials not processed by the Subcontractor, plus a sum equal to 8% of the remainder of such costs, but the aggregate of such sums shall not exceed 6% of the whole of such costs. For the purpose of subdivision (ii) such costs shall exclude the cost of discharging liabilities for parts, materials and services not rendered by the Subcontractor before the effective date of termination;
- (3) The reasonable costs of the Subcontractor in making settlement hereunder and in protecting property in which the Contractor has or may acquire an interest;
- (4) Payments made under this paragraph (b), exclusive of payments under subparagraph (3) shall not exceed the aggregate price specified in this order, less payments otherwise made or to be made.

C. With the consent of the Contractor, the Subcontractor may retain at an agreed price or sell at an approved price any

completed articles, or any articles, materials, work in process, or other things the cost of which is allocable or apportionable to this order under paragraph (b) (2) above, and will credit or pay the amounts so agreed or received as the Contractor directs. As directed by the Contractor, the Subcontractor will transfer title to, and make delivery of any such articles, materials, work in process or other things not so retained or sold with appropriate adjustment to cover costs of delivery.

*D.* Any adjustment, settlement, and/or payment made or to be made under this Article 17 is subject, without limitation, to the prior approval of the United States Maritime Commission.

*E.* Contractor may at any time after cancellation, in whole or in part, take over all or part of the work and prosecute the same to completion by contract or otherwise and may take possession and utilize in completing the work such materials, appliances and plants as may be on the site of the work and necessary for completion of the work. The costs which Subcontractor incurs by reason of Contractor's taking over the work shall be included in the computation of costs referred to above.

*F.* The provisions of this Article 17 shall not limit or affect the right of the Contractor to terminate this order for the default of the Subcontractor.

Article 18. Default: The following shall constitute events of default under this Subcontract:

(a) Failure of the Subcontractor in any respect to use due diligence in proceeding with the performance of the work required under this Subcontract or failure to perform any of the covenants on its part to be performed hereunder, provided that Contractor in either instance shall give written notice to Subcontractor as to such failure or breach (The Contractor may accept delayed deliveries from or performance by Subcontractor without thereby waiving its right to demand strict compliance with the delivery or performance schedule set forth in this Subcontract with respect to all other deliveries or work);

(b) The filing by the Subcontractor of a petition in bankruptcy, or for reorganization under the Bankruptcy Act, or the entry of an order upon petition against the Subcontractor adjudicating the Subcontractor a bankrupt, or the appointment of a receiver or receivers of the Subcontractor or any property belonging to the Subcontractor necessary for the performance of its obligations under this Subcontract;

(c) The failure of the Subcontractor to pay when due any charge for labor, material, or services in connection with work under this Subcontract.

Article 19. Termination for Default: Upon the occurrence of any events of default set forth in Article 18 hereof, Contractor may terminate this Subcontract by written or by telegraphic notice to Subcontractor. In the event of termination of this Subcontract pursuant to this article, the Contractor and/or the United States Maritime Commission may enter the plant of the Subcon

tractor and take possession of all materials to be furnished under this Subcontract, either completed or uncompleted, and any apparatus, merchandise, equipment, fittings and supplies theretofore or thereafter delivered at the plant of the Subcontractor to be incorporated in the work covered by this Subcontract, together with all plans, specifications, calculations and other records required for the performance of the work. Contractor may complete the performance of any work with respect to which Subcontractor defaulted and any excess in cost over the subcontract price stipulated herein and adjustments, if any, shall be charged to the Subcontractor; provided, however, that any action taken by Contractor shall not affect or impair any rights or claims of the Contractor to damages for breach by the Subcontractor of any of the conditions of this Subcontract.

**Article 20. Terms of Payment:**

Unless otherwise qualified on the face hereof:

A. If the work to be carried on under this Subcontract is classified as Facilities or Maintenance A (not an integral part of Contractor's vessels construction schedule), then:

Contractor at the close of each month, through duly authorized representatives, shall estimate the value of work done and materials furnished by Subcontractor during such month and Contractor shall pay to Subcontractor in accordance with Contractor's usual practice of vouchering accounts, ninety (90) per cent of the amount estimated to be due Subcontractor for that month. The remaining ten (10) per cent of such amount shall be paid Subcontractor by Contractor thirty-five (35) days after completion and acceptance by the Contractor of the work provided for herein.

All estimates herein provided for shall be made by Contractor's Engineer, whose measurements and calculations as to the quantities and amounts of work performed shall be final, conclusive and binding upon the parties hereto.

B. If the work to be carried on under this Subcontract is classified as Vessels or Maintenance B (an integral part of Contractor's vessels construction schedule), then:

Contractor shall pay to Subcontractor the amount due Subcontractor for each Vessel for which Subcontractor has completed the work specified on the face hereof within fifteen (15) days after delivery to and acceptance of such Vessel by the United States Maritime Commission.

**Article 21. Acceptance of Work:** It is mutually agreed that no payment made under this Subcontract, except the final payment, shall be evidence of the performance of this Subcontract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective or improper materials.

**Article 22. Patent Rights:** It is mutually agreed that Subcontractor shall pay all claims growing out of any use or infringement of patent rights covering work under this Subcon-



tract, or any part thereof, or of any tools, implements or appliances used on or in connection with said work, including their use by or for the Contractor and/or the United States Maritime Commission after installation, and Subcontractor agrees fully to reimburse Contractor and/or the United States Maritime Commission for any royalties, damages, attorneys' fees, or other payments that Contractor and/or the United States Maritime Commission shall be called upon or be obligated to pay by virtue of any use or infringement of such patent rights, originating or growing out of said work or any part thereof, or of any tools, implements or appliances used on or in connection therewith.

Article 23. Bond: If required by this Subcontract, as indicated on the face of this Subcontract, Subcontractor agrees to furnish two separate bonds, one for "Performance" coverage in the amount of 50% of the Subcontract compensation, and the other for "Payment" coverage in the amount of 50% of the Subcontract compensation, the two together being equal to 100% of the Subcontract compensation. The latest revision of Government Standard Form 25 ("Performance") and Form 25-A ("Payment") shall be used, and the bonds shall be issued by a bonding company on the approved list of the Treasury Department (Form 356). The United States Maritime Commission as well as the Contractor shall be named as Obligee on the bonds. Such bonds shall be executed and delivered to the Contractor before any work is commenced under this Subcontract. Subcontractor shall pay and solely bear the cost of all premiums on such bonds.

Article 24. Insurance:

A. In view of Article 25 hereof Subcontractor should for his own protection carry adequate Public Liability Insurance, Property Damage Insurance, Automobile Public Liability Insurance, Automobile Property Damage Insurance, and Workmen's Compensation Insurance.

B. This Subcontract is subject to the provisions of the Act of June 25, 1936 (Public No. 814), entitled "An Act to provide more adequate protection to workmen and laborers on project buildings, constructions, improvements, and property wherever situated, belonging to the United States of America, by granting to the several States jurisdiction and authority to apply the State Workmen's Compensation laws on all property and premises belonging to the United States of America."

Article 25. Liability for Third Party Claims: Subcontractor expressly agrees to indemnify and save harmless Contractor and/or the United States Maritime Commission from and against any and all claims, other than claims of the Subcontractor, Contractor, or the United States Maritime Commission, arising directly or indirectly out of work to be performed under this Subcontract.

Article 26. Liens: Subcontractor expressly agrees to discharge at once all liens which may be filed in connection with said work and hold harmless therefrom the Contractor, the United States Maritime Commission and the owners of the premises upon which the work is to be performed.

Article 27. Subcontractor to Remove Debris and Waste Materials: Upon termination or completion of said work Subcontractor shall remove all debris and waste material and leave the premises in a neat and clean condition, all to the satisfaction of the Contractor.

Article 28. Assignment: This Subcontract shall not be assigned, sublet or transferred in whole or in part by Subcontractor, nor shall Subcontractor assign any moneys due or to become due, without prior written consent of Contractor; and any attempted assignment hereunder without the previous written consent of Contractor shall be void. No drafts for subcontracted work will be allowed.

Article 29. Attorneys' Fees: Subcontractor hereby agrees to pay to Contractor a reasonable sum as attorneys' fees in all court actions brought by either of them against the other or in which they are both plaintiffs or defendants, and also in court actions involving offsetting claims between Subcontractor and Contractor, because of any doubts, disputes or actions arising out of this Subcontract, except in the following cases:

(a) When Subcontractor obtains a favorable net judgment against Contractor, after consideration of claims and offsets of Contractor which are allowed by the court against Subcontractor, for breach of this Subcontract;

(b) When Contractor is denied a favorable judgment by a court in any suit against Subcontractor which may be brought by Contractor.

Article 30. Risk of Loss and Title to Property: Title to all vessels, facilities, buildings or structures completed or in the course of construction, and title to all materials, equipment or supplies, whether paid for or not, delivered to the job site or approved storage site to be incorporated in the completed projects and/or vessels shall be in the Commission, and any risk of loss or damage to any such property shall be borne by the Commission. Title to any materials, machinery, or equipment, to the extent the Contractor makes payment therefor, even though such materials, machinery, or equipment have not been delivered to the site of the work, and even though the work under this Subcontract has not been completed by the Subcontractor, shall vest in the Commission immediately on such payment being made, provided, however, that the Subcontractor will hold the Contractor and/or the Commission free from any loss or damage to any such property prior to delivery to the job site or approved storage site. The provisions as to title being vested in the Commission shall not operate to relieve the Subcontractor from any

duties imposed under the terms of this Subcontract, nor shall they be construed as an admission that Contractor is obligated to pay for material, machinery or equipment other than set forth in Article 17 or prior to delivery to the job site. Unless it is otherwise provided on the face of this Subcontract, no insurance shall be carried by Subcontractor covering property, as to which risk of loss, as provided herein, is in the Commission.

Article 31. Union Conditions: Contractor has heretofore entered and may hereafter enter into agreements with the Building and Construction Trades Department and the Metal Trades Department of the American Federation of Labor and with certain International and Local Unions affiliated with such Departments, providing that all workmen, with certain exceptions stated in said agreements, shall be employed only from and through such Unions and fixing the wages, hours and working conditions applying to such employment. Subcontractor agrees to abide by the terms of the said Union Agreements and Governmental Regulations, in so far as they may be applicable to him.

Article 32. Wage Rates:

A. If this Subcontract be for maintenance or for vessels construction, and hence covered by Contractor's Vessels Contracts, then in performance of the work hereunder Subcontractor shall pay wage rates corresponding to the scale of wages prevailing in the shipyard of Contractor for the crafts involved. The only exceptions to the payment of the foregoing rates shall be made in the case of certain classes of work which by reason of their technical or specialized nature are not ordinarily performed in the shipyards of Contractor and where it is the established practice of Contractor to subcontract such work. In such case Subcontractor shall pay the wage rates normally prevailing between himself and his employees for such specialty trade.

B. The Subcontractor and any subcontractors under him shall pay all mechanics and laborers employed on work under this Subcontract and directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at the time of payment, computed at wage rates not less than those provided in the agreement with the Unions, as set forth under Article 31 hereof, or less than those which may be determined by the Secretary of Labor pursuant to the provisions of the Act approved March 3, 1931 (46 Stat. 1494) (Davis-Bacon Act) to be the prevailing rates for the various classes of such laborers and mechanics; and the scale of wages to be paid shall be posted by the Subcontractor in a prominent and easily accessible place at the site of the work. The Contractor and/or the United States Maritime Commission shall have the right to withhold from the Subcontractor, and from subcontractors under him, so much of the accrued payments as may be considered necessary by the Contractor and/or the United States Maritime Commission to pay to laborers and mechanics employed by the Subcontractor, or to



any other subcontractors on the work, the difference between the rates of wages required to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to subcontractors or their agents.

**Article 33. Eight-Hour Law—Overtime Compensation :**

(a) If the work performed hereunder is pursuant to Contractor's Facilities Contract with the United States Maritime Commission, no laborer or mechanic doing any part of the work contemplated by this Subcontract, in the employ of the Subcontractor, shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this Article. The wages of every laborer and mechanic employed by the Subcontractor shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this article a penalty of \$5.00 shall be imposed upon the Subcontractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this article and all penalties thus imposed shall be withheld by the Contractor for use and benefit of the Government; provided that this stipulation shall be subject in all respects to the exceptions and provisions of the U. S. Code, Title 40, Sections 321, 324, 325 and 326, relating to hours of labor, as in part modified by the provisions of Section 303 of Public Act No. 781, 76th Congress, approved September 9, 1940, relating to Compensation for Overtime.

(b) Unless otherwise provided by law, provisions of law prohibiting more than eight (8) hours of labor in any one day of persons engaged upon work covered by the Contractor's Vessels Contracts with the United States Maritime Commission shall, in accordance with the provisions of the Act approved October 10, 1940 (Public No. 831, 76th Cong.) be suspended.

**Article 34. Labor Statistics and Kickback Statute :**

1. The Subcontractor will report monthly within five (5) days after the close of each calendar month, on forms to be furnished by the United States Department of Labor,—(1) the number of persons on its payroll, (2) the aggregate amount of such payrolls, (3) the man-hours worked, and (4) the total expenditures for materials; provided, however, that the requirements of this paragraph shall be applicable only to work done at the site of the Construction project.

B. Subcontractor shall make and file all affidavits concerning rates of pay for labor, etc., and will otherwise comply with the

regulations promulgated by the Secretary of Labor pursuant to the provisions of the Act approved June 13, 1934 (40 U.S.C. 276 (b) and (c) ). In compliance with the above, the Subcontractor agrees to furnish the Contractor with triplicate copies of all payrolls of the Subcontractor and of his own subcontractors for work performed on the site. In addition a triplicate appointment affidavit giving the representative of the Subcontractor and representatives of the Subcontractor's subcontractors the authority to certify payrolls must be supplied. With each set of triplicate payrolls triplicate certifications must be properly executed and attached. The affidavit forms will be supplied by the Contractor.

Article 35. Affidavits: The Contractor may, if the United States Maritime Commission so directs, require any person, paid from any funds made available under this Subcontract, to execute and to file an affidavit in such form as to satisfy the requirements of Public Law No. 5 and/or No. 23 (77th Congress); but the execution and filing of such affidavit shall be without prejudice to the rights of the Contractor to require such further evidence in the premises as it may deem desirable.

Article 36. Arbitration: Doubts or disputes arising under this Subcontract between the Contractor and Subcontractor shall be submitted to the Regional Director, West Coast Region of the United States Maritime Commission, or if there be no such Director then to the United States Maritime Commission, or to such representative or representatives of the United States Maritime Commission as the Regional Director or the United States Maritime Commission, as the case may be, may designate for arbitration and determination. The decision of the arbitrator or arbitrators shall be final and conclusive as to the parties hereto.

Article 37. Convict Labor: The Subcontractor shall not employ upon the work covered by this Subcontract any person undergoing sentence of imprisonment.

Article 38. Removal of Employees: The Contractor may require the removal or discharge of any person employed in or about the Contractor's facilities if it determines that the employment of such person is detrimental to the performance of the work under the contracts with the United States Maritime Commission specified on the face hereof.

Article 39. No Discrimination: The Subcontractor agrees that it will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin and further agrees that it will include a provision similar to this provision in all subcontracts.

Article 40. Domestic Preference: In the performance of the work covered by this Subcontract the Subcontractors, material men, or suppliers shall use only such unmanufactured articles, materials and supplies as have been mined or produced in the United States, and only such manufactured articles, material and supplies as have been manufactured in the United States.

substantially all from articles, materials or supplies mined, produced or manufactured, as the case may be, in the United States; the foregoing provision shall not apply to such articles, materials or supplies of the class or kind to be used or such articles, materials or supplies from which they are manufactured, as are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or to such articles, materials, or supplies as may be excepted by the head of the Department under the proviso of Title III, Section 3, of the Act of Congress approved March 3, 1933 (41 U.S.C. 10).

Article 41. Defense Clause: The Subcontractor shall take all reasonable precautions to prevent the employment on the work covered hereby of such persons as are prohibited from employment in, and/or entry into, any shipyard, plant or vessels under prohibitions of the United States Navy Department or the United States Maritime Commission.

The Subcontractor further agrees to take all reasonable measures to protect the work to be performed hereunder from sabotage. The Subcontractor further agrees to report to the United States Authorities and to the Contractor any information coming to the attention of the Subcontractor which indicates that any danger of sabotage exists or that any act of sabotage has been committed.

Article 42. Information Confidential: All plans, drawings, specifications and/or information given Subcontractor in connection with performance of this Subcontract shall be held confidential by the Subcontractor and shall not be used for any purposes other than those for which they have been supplied or prepared. The Subcontractor agrees that, as far as possible, it will keep confidential the making of this Subcontract and the terms hereof.

Article 43. Principal Contract Included in Subcontract: In the performance of this Subcontract, Subcontractor binds himself to the Contractor and to the United States Maritime Commission to comply fully with all the undertakings and obligations of the Contractor (excepting such as do not apply to the Subcontractor's work), under the facilities and/or vessels contracts with the United States Maritime Commission specified on the face hereof, which are hereby adopted and made a part of this Subcontract. Subcontractor is hereby advised that copies of said principal contracts are available for his inspection at the Contractor's offices at Richmond, California.

Article 44. Contract to Inure to Benefit of United States Maritime Commission: If prior to the completion of this Subcontract the United States Maritime Commission shall take over the facilities hereinabove mentioned, this Subcontract shall inure to its benefit and shall be completed in the same manner as if this Subcontract had been made with the United States Maritime Commission in the first instance.



Article 45. Price and Rate Regulations: Subcontractor represents, warrants, certifies and agrees that the rates and/or price or prices established herein do not and will not exceed the maximum rates and/or price or prices chargeable and payable under the regulations of the Office of Price Administration, and are not and will not be in excess of the maximum, and are not and will not be less than the minimum chargeable and payable under any other applicable State, Federal or other governmental legislation or regulations, and that all other requirements of the Office of Price Administration have been complied with. In the event any revision of such legislation or regulations or any subsequent applicable legislation or regulations conflict and/or conflicts with the provisions of this Subcontract, such conflicting provisions shall be deemed to be modified to conform therewith. Subcontractor agrees to reimburse and/or pay to the Contractor, or its assigns, all moneys paid hereunder in excess of the maximum rates and/or price or prices chargeable and payable under any such legislation or regulations.

Article 46. Renegotiation: In the event that the main contract under which this Subcontract was made was executed before April 28, 1942, or in the event that the main contract under which this Subcontract was made was executed on or after April 28, 1942, and this Subcontract is for an amount equal to or less than \$100,000.00, and this Subcontract is renegotiated under the provisions of Section 403 of Public Law 528 (77th Cong.) approved April 28, 1942 (Sixth Supplemental National Defense Appropriation Act, 1942), as amended by Title VIII of Public Law 753 (77th Cong.), approved October 21, 1942 (Revenue Act of 1942), the Subcontractor hereby agrees with the Contractor

1. That if such renegotiation results in a reduction of the contract price of this Subcontract, the amount of such reduction shall, as directed by the Chairman of the United States Maritime Commission, hereinafter at times referred to as the Chairman of the Commission.
  - (a) Be deducted by the Contractor from payments to the Subcontractor under this Subcontract; or
  - (b) Be paid by the Contractor directly to the *Government*; or
  - (c) Be repaid by the Subcontractor to the Contractor.
2. That the Contractor shall not be liable to the Subcontractor for or on account of any amount repaid to the Contractor or paid to the *Government* by the Subcontractor or deducted by the Contractor from payment under this Subcontract, pursuant to directions from the Chairman of the Commission in accordance with the provisions hereof, and the Subcontractor will pay to the Contractor all amounts withheld by the *United States* from the Contractor and all amounts paid to the *United States* by the Contractor, as a result of such renegotiation.

3. That the term "Chairman of the Commission" for the purpose hereof, shall be deemed to include any authorized representative of the United States Maritime Commission.

In the event that the main contract under which this Subcontract was made was executed on or after April 28, 1942, and prior to March 26, 1944, and this Subcontract is for an amount in excess of \$100,000.00, pursuant to the provisions of Section 403 of Public Law 528 (77th Cong.) approved April 28, 1942 (Sixth Supplemental National Defense Appropriation Act, 1942), as amended by Title VIII of Public Law 753 (77th Cong.), approved October 21, 1942 (Revenue Act of 1942), the Subcontractor hereby agrees with the Contractor:

1. That the Chairman of the Commission may renegotiate the contract price of this Subcontract at a period or periods when, in his judgment, the profits derived or to be derived hereunder can be determined with reasonable certainty; and
2. That the Contractor may retain for the Commission the amount of any reduction in the contract price of this Subcontract pursuant to its renegotiation hereunder, or the Subcontractor will repay to the Commission any excess profits from this Subcontract paid to him and not eliminated through reductions in the contract price or otherwise, as the Chairman of the Commission may direct; and
3. That the Contractor shall have no liability to the Subcontractor on account of any amount so retained by the Contractor or repaid by the Subcontractor to the Commission pursuant to the provisions of subparagraph 2 hereof; and
4. That, in the discretion of the Chairman of the Commission, the Subcontractor will insert in any subcontract made by him under this Subcontract, provisions corresponding to those of subparagraphs 1 to 5, inclusive, hereof; and
5. That the Commission may retain from amounts otherwise due the Contractor, or the Contractor shall repay to the Commission, as the Chairman of the Commission may direct, the amount of any reduction in the contract price of any subcontract under this Subcontract, which the Contractor is directed, pursuant to the provisions of subparagraphs 1 to 4, inclusive, hereof, to withhold from payments otherwise due to the Subcontractor and actually unpaid at the time the Contractor receives such direction; and
6. That the Contractor shall not be liable to the Subcontractor for or on account of any amount retained by the Commission or by the Contractor for the Commission, or

repaid by the Contractor or the Subcontractor to the Commission, pursuant to directions from the Chairman of the Commission in accordance with the provisions hereof, and the Subcontractor will pay to the Contractor all amounts paid to the Commission by the Contractor as a result of such renegotiation; and

7. That the term "Chairman of the Commission" for the purposes hereof shall be deemed to include any authorized representative of the United States Maritime Commission.

In the event that the main contract under which this Subcontract was made was executed on or after March 26, 1944, this Subcontract shall be deemed to contain all the provisions required by subsection (b) of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended by Section 701 of the Revenue Act of 1943.

Article 47. Liquidated Damages: If liquidated damages are provided for on the face of this Subcontract then the following provision is hereby agreed upon by the Contractor and the Subcontractor:

The damages that may result from any delay in completion of the work by the time agreed upon will be difficult, if not impossible, of ascertainment. If the work is not completed on or before the date fixed for its completion by the terms of the Subcontract the Subcontractor shall pay to the Contractor as fixed, agreed and liquidated damages the sum specified on the face of this Subcontract for each calendar day's delay until the work is satisfactorily completed or until such time as the Contractor may reasonably procure the completion of the work by another Subcontractor or complete the work itself. Whatever sums may be due as liquidated damages for delay may be deducted from payment due to the Subcontractor or may be collected from the Subcontractor or the Subcontractor's surety or sureties. This provision for liquidated damages shall not be construed so as to in any manner interfere with, terminate, or require the exercise of the rights given to the Contractor under this Subcontract, including without limitation, those rights set forth in Article 17-E covering "taking over of work after cancellation."



EXHIBIT B

Addendum No. 1 to Subcontract No. VS-14

MCc-15762

Hulls Numbered 557 to 573

This Agreement made and entered into this 10th day of August, 1944, by and between The Permanente Metals Corporation, Shipbuilding Division, Richmond, California, hereinafter called "Contractor," and Birnie Electric Company, with offices located at 816 West 5th Street, Los Angeles, California, hereinafter called "Subcontractor."

Witnesseth:

Whereas, the parties hereto have heretofore on the 29th day of May, 1944, entered into Subcontract No. VS-14, whereby said Subcontractor was required to supply certain materials and to fabricate and install the Degaussing System, Radar, Voice Tube, Mechanical Telegraph and Mechanical Wireways on five (5) AP-5 Design Vessels, numbered 552 to 556, inclusive; and

Whereas, it is Contractor's desire to have Subcontractor perform similar work on seventeen (17) additional AP-5 Design Vessels, numbered 557 to 573, inclusive, under Prime Contract No. MCc-15762;

Now, Therefore, It Is Agreed Between the Parties Hereto:

1. Subcontractor shall perform all of the work specified in said Subcontract No. VS-14 on seventeen

(17) additional AP-5 Design Vessels, numbered 557 to 573, inclusive, under Prime Contract No. MCC-15762.

2. Contractor agrees to pay Subcontractor the same consideration for the work herein specified as provides in said Subcontract No. VS-14; provided, however, that Subcontractor's costs shall be determined on the completion of the fifth, thirteenth, and twenty-second vessels in accordance with provisions of said Subcontract No. VS-14 and outstanding amounts, if any, found to be due the Subcontractor for the work performed on such vessels shall be paid within fifteen (15) days after such determination. Such determination shall be final for the vessels completed and the profits on such vessels shall not be considered for determination of profits on subsequent vessels.

3. You are required to furnish evidence that the penal sums in bonds heretofore furnished are adjusted upward so that each will be 50% of the new total contract price.

4. Except as herein otherwise provided all of the terms and conditions of said Subcontract No. VS-1 shall remain unchanged and in full force and effect.

5. The work required to be performed under this addendum has not been provided for in any previous subcontract, or addenda thereto.

This addendum is subject to the approval of the United States Maritime Commission.

THE PERMANENTE  
METALS CORPORATION,  
Contractor.

/s/ T. A. BEDFORD,  
Assistant General Manager.

BIRNIE ELECTRIC  
COMPANY,  
Subcontractor.

By /s/ JOHN URQUHART BIRNIE,  
Sole Proprietor.

Approved as to Form:

THE PERMANENTE  
METALS CORPORATION,

By /s/ LUCAS A. POWER,  
Legal Department.

Approved: 9/19/44.

By /s/ C. V. FISHER,  
Material Controller.

### EXHIBIT C

Addendum No. 2 to Subcontract No. VS-14

MCc-15762

This Agreement made and entered into this 19th day of October, 1944, by and between The Perma-

nente Metals Corporation, Shipbuilding Division, Richmond, California, hereinafter called "Contractor," and Birnie Electric Company, with offices located at 816 West 5th Street, Los Angeles, California, hereinafter called "Subcontractor."

Witnesseth:

Whereas, the parties hereto have previously entered into Subcontract No. VS-14 and Addendum No. 1 thereto whereby Subcontractor was required to perform certain electrical installation work on twenty-two (22) AP-5 Design Vessels, numbered 552 to 573, inclusive, under Prime Contract No. MCc-15762; and

Whereas, complete plans and specifications were not available at the time of entering into Subcontract No. VS-14; and

Whereas, provision was made in the original bid proposal to add additional work upon subsequent plans and specifications becoming available.

Now, Therefore, It Is Agreed Between the Parties Hereto as Follows:

1. The changes and additions set forth in Exhibit "A," approved by the Principal Hull and Machinery Inspectors of the United States Maritime Commission, as necessary under the plans and specifications on hulls numbered 552 to 573, inclusive shall be included herein and made a part of Contract No. VS-14.

2. The compensation provisions of Subcontract

No. VS-14 shall be changed by striking the compensation schedule found in paragraph one of the compensation provision and substitute in lieu of such schedule Exhibit "B" attached hereto and made a part hereof.

3. You are required to furnish evidence that the penal sums in bonds heretofore furnished are adjusted upward so that each will be 50% of the new total contract price.

4. Except as herein otherwise provided the terms and conditions of Subcontract No. VS-14 as amended by Addendum No. 1 shall remain in full force and effect.

5. The work required to be performed under this addendum has not been provided for in any previous subcontract or addenda thereto.

This addendum is subject to the approval of the United States Maritime Commission.

THE PERMANENTE  
METALS CORPORATION,  
Contractor.

By /s/ T. A. BEDFORD,  
Assistant General Manager.

BIRNIE ELECTRIC  
COMPANY,

By /s/ JOHN U. BIRNIE,  
Owner.

By /s/ OSCAR A. MELLIN,  
His Attorney in Fact.

Approved as to Form:

By /s/ R. K. FRISBE,  
Contractor's Legal Dept.

Approved: 10/28/44.

UNITED STATES MARITIME  
COMMISSION,

By /s/ C. V. FISHER,  
Material Controller.

Exhibit "A"

Additions and Changes in Design to Contract VS-14  
Birnie Electric Company

Amount

Degaussing

1. Change in design and routing of degaussing system trough and back plates and additional back plates in afterpeak .....	\$1,085.12
2. Change in design of cleats in forepeak .....	342.00
3. Change design of control panels .....	275.31
4. Changes in design of all penetrations at frame 87 port, frame Nos. 40, 50, 73, 82 and 91 starboard. Pack and seal all penetrations around cables to make rooms fume tight .....	1,607.97
5. Changes in design of wiring of balancer coils in wheelhouse .....	350.11
Contract price as shown in VS-14 .....	\$7,725.00
Bond @ \$6.65 per M. ....	51.37
	<hr/>
	7,776.3
Adjusted Contract price .....	\$11,437.0



## Amount

## Radar

1. Fabricate and install foundations for equipment, brackets, and mountings of equipment not shown on plans. Prepare working drawings for same.....	\$2,569.16
2. Additional cables required not shown to accommodate changes in type of equipment.....	848.00
3. Due to Radar equipment being revised continuously by the installation of latest type of equipment continuous contact with U. S. Navy and United States Maritime Commission necessary to change working drawings to accommodate different types of installations .....	250.00
Contract price as shown in	
Contract VS-14 .....	\$2,983.00
Bond @ \$6.65 per M. ....	19.84
	<hr/>
	3,002.84
	<hr/>
Adjusted Contract price .....	\$6,670.00

## Voice Tube and Whistle

1. Additional structural members installed. Necessary to re-route voice tube to wheelhouse and bridge.....	\$ 458.20
2. Change in routing of voice tube as per plan S65-4-3-4-Alt. 2 .....	163.49
3. Brazing penetrations to make rooms fume tight.....	32.88
Contract price as shown in VS-14.....	\$666.00
Bond @ \$6.65 per M. ....	4.43
	<hr/>
	670.43
	<hr/>
Adjusted Contract price .....	\$1,325.00

## Mechanical Telegraph

1. Change in design of brackets .....	\$ 253.57
2. Change routing of mechanical telegraph in Captain's room .....	169.04
3. Change routing in machine flat .....	422.60
4. Change routing in boiler room .....	845.20
Contract price as shown in VS-14.....	\$2,796.00
Bond @ \$6.65 per M. ....	18.59
	<hr/>
	2,814.59
	<hr/>
Adjusted Contract price .....	\$4,505.00

Amount

## Mechanical Wireway

1. Bids were taken for enclosure as shown on drawing S62-2-9 October 1, sheet #3.

Wireway was fabricated in Los Angeles and shipped to Subcontractor.

Main cableways were changed and due to increased mechanical changes beyond the control of the Subcontractor it is necessary for Subcontractor to alter and refit the fabricated material rather than discard and refabricate. Perforated material not available on West Coast and delivery cannot be made in time to complete schedule. By re-fabrication, material available can be used.

This has the approval of Mr. Carl Olson,

Naval Architect .....\$1,926.84

Contract price as shown in

Contract VS-7 .....\$3,333.00

Bond @ \$6.65 per M. .... 22.16

3,355.16

Adjusted Contract price .....\$5,282.00

Approved as to necessity

/s/ JAMES KASTROSKY,  
Principal Machinery Inspector.

Approved as to necessity

/s/ CHARLES C. STEWART,  
Principal Hull Inspector.

## Contract VS-14—Birnie Electric Company

*The Permanente Metals Corp., etc.*

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Hull No.	Degaussing	Radar	Voice Tube and Whistle	Mechanical Telegraph	Mechanical Wireways	Subtotal	Bond Premium	Grand Total
552.....	\$11,437.00	\$6,670.00	\$1,325.00	\$4,505.00	\$5,282.00	\$29,219.00	\$194.31	\$29,413.31
553.....	11,437.00	6,670.00	1,325.00	4,505.00	5,282.00	29,219.00	194.31	29,413.31
554.....	11,322.63	6,603.30	1,311.75	4,459.95	5,229.18	28,926.81	192.36	29,119.17
555.....	11,322.63	6,603.30	1,311.75	4,459.95	5,229.18	28,926.81	192.36	29,119.17
556.....	11,208.26	6,536.60	1,298.50	4,414.90	5,176.36	28,634.62	190.42	28,825.04
557.....	11,208.26	6,536.60	1,298.50	4,414.90	5,176.36	28,634.62	190.42	28,825.04
558.....	11,093.89	6,469.90	1,285.25	4,369.85	5,123.54	28,342.43	188.48	28,530.91
559.....	11,093.89	6,469.90	1,285.25	4,369.85	5,123.54	28,342.43	188.48	28,530.91
560.....	10,979.52	6,403.20	1,272.00	4,324.80	5,070.72	28,050.24	186.53	28,236.77
561.....	10,979.52	6,403.20	1,272.00	4,324.80	5,070.72	28,050.24	186.53	28,236.77
562.....	10,865.15	6,336.50	1,258.75	4,279.75	5,017.90	27,758.05	184.59	27,942.64
563.....	10,865.15	6,336.50	1,258.75	4,279.75	5,017.90	27,758.05	184.59	27,942.64
564.....	10,750.78	6,269.80	1,245.50	4,234.70	4,965.08	27,465.86	182.65	27,648.51
565.....	10,750.78	6,269.80	1,245.50	4,234.70	4,965.08	27,465.86	182.65	27,648.51
566.....	10,636.41	6,203.10	1,232.25	4,189.65	4,912.26	27,173.67	180.70	27,354.37
567.....	10,636.41	6,203.10	1,232.25	4,189.65	4,912.26	27,173.67	180.70	27,354.37
568.....	10,522.04	6,136.40	1,219.00	4,144.60	4,859.44	26,881.48	178.76	27,060.24
569.....	10,522.04	6,136.40	1,219.00	4,144.60	4,859.44	26,881.48	178.76	27,060.24
570.....	10,407.67	6,069.70	1,205.75	4,099.55	4,806.62	26,589.29	176.82	26,766.11
571.....	10,407.67	6,069.70	1,205.75	4,099.55	4,806.62	26,589.29	176.82	26,766.11
572.....	10,293.30	6,003.00	1,192.50	4,054.50	4,753.80	26,297.10	174.88	26,471.98
573.....	10,293.30	6,003.00	1,192.50	4,054.50	4,753.80	26,297.10	174.88	26,471.98
Total.....	\$239,033.30	\$139,403.00	\$27,692.50	\$94,154.50	\$110,393.80	\$610,677.10	\$4,061.00	\$614,738.10

## EXHIBIT D

Addendum No. 3 to Subcontract No. VS-14

MCc-15762

This Agreement made and entered into this 20th day of November, 1944, by and between The Permanente Metals Corporation, Shipbuilding Division, Richmond, California, hereinafter called "Contractor," and Birnie Electric Company, with offices located at 816 West 5th Street, Los Angeles, California, hereinafter called "Subcontractor,"

Witnesseth:

Whereas, the Company has heretofore entered into Subcontract No. VS-14 and Addenda 1 and 2 thereto with the Birnie Electric Company for the performance of certain electrical work on hulls being constructed at The Permanente Metals Corporation Shipyard Number Two; and

Whereas, certain of said hulls were transferred to Kaiser Co. Inc., Richmond Shipyard Number Three, for outfitting; and

Whereas, it has been deemed expedient to delete from the work to be performed by Subcontractor hereunder all work required to be done on said hulls which are transferred to said Richmond Shipyard Number Three, with the exception of "radar" work on Hulls 568 and 570, which Subcontractor has agreed to do at said Richmond Shipyard Number Three.

Now, Therefore, It Is Agreed Between the Parties Hereto as Follows:

1. Subcontractor agrees to perform the "radar" work on Hulls 568 and 570 while such hulls are being outfitted at Shipyard Number Three, and to the deletion of Hulls 557, 559, 561, 563 and 566 from Subcontract No. VS-14; and also the deletion from Subcontract No. VS-14 of all work on Hulls 568 and 570 with the exception of the "radar" work.

2. Parties further agree that no cancellation fee shall be paid for the deleted hulls and items and that no extra compensation shall be provided for the performance of the "radar" work on Hulls 568 and 570 at Richmond Shipyard Number Three.

3. Except as herein otherwise provided all terms and conditions of Subcontract No. VS-14 as modified by Addenda 1 and 2 thereto shall remain unchanged and in full force and effect.

This addendum is subject to the United States Maritime Commission approval.

THE PERMANENTE  
METALS CORPORATION,  
Contractor.

By /s/ T. A. BEDFORD,  
Assistant General Manager.

BIRNIE ELECTRIC  
COMPANY,  
Subcontractor.

/s/ JOHN U. BIRNIE,  
Owner.

By /s/ W. M. POWER,  
His Attorney in Fact.



Approved as to Form:

THE PERMANENTE  
METALS CORPORATION,

By /s/ ROGER SAMS,  
Legal Department.

Approved: 2/27/45.

UNITED STATES  
MARITIME COMMISSION,

By /s/ C. V. FISHER,  
Material Controller.

EXHIBIT E

U. S. Standard Form No. 25 (Revised)

Performance Bond  
(Construction or Supply)

C-28504

Know all Men by these Presents, That we, Birnie Electric Company of 816 W. 5th Street, Los Angeles 13, California, as Principal, and Massachusetts Bonding and Insurance Company, a corporation established under the laws of the Commonwealth of Massachusetts and having its principal office in Boston in said Commonwealth as Surety are held and firmly bound unto The Permanente Metals Corporation and the United States of America represented by the U. S. Maritime Commission as their interest may appear, in the penal sum of Forty-four Thousand Forty-eight & 45/100 (\$44,048.45) dollar

for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of this Obligation is such, that whereas the principal entered into a certain contract, hereto attached, with The Permanente Metals Corporation May 29, 1944, for installation of De-gaussing System, Radar System, and all other work covered by Articles 1 to 5 inclusive on face of subcontract (VS-14) on Hulls Nos. 552 to 556, inclusive, a total of five (5) vessels under Prime Contract No. MCe-15762.

Now therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by The Permanente Metals Corporation with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety **being hereby** waived, then, this obligation to be void; otherwise to remain in full force and virtue.

In witness whereof, the above-bounden parties have executed this instrument under their several seals this 31st day of July, 1944, the name and corporate seal of each corporate party being hereto

affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

[Seal]     /s/ JOHN URQUHART BIRNIE,  
                 Individual Principal,  
                 816 West 5th St.,  
                 Los Angeles 13, Calif.

In presence of—

       /s/ G. M. CORREO,  
                 532 North Gerona Ave.,  
                 San Gabriel, Calif.

                 MASSACHUSETTS BONDING  
                 AND INSURANCE CO.,  
                 Corporate Surety,  
                 458 S. Spring Street,  
                 Los Angeles 13, Calif.

[Seal] By /s/ F. R. ROBINSON,  
                 Attorney-in-Fact.

Attest:

       /s/ CATHERINE V. WILSON.

The rate of premium on this bond is \$6.65 per thousand.

Total amount of premium charged, \$581.97.

(The above must be filled in by corporate surety)

EXHIBIT F

U. S. Standard Form No. 25 (Revised)

Performance Bond  
(Construction or Supply)

C-28589

Know all Men by these Presents, That we, Birnie Electric Company, 816 West Fifth Street, Los Angeles 13, California, as Principal, and The Permanente Metals Corporation and the United States of America represented by the U. S. Maritime Commission as their interest may appear, Massachusetts Bonding and Insurance Company, a corporation established under the laws of the Commonwealth of Massachusetts and having its principal office in Boston in the said Commonwealth, as Surety, are held and firmly bound unto the United States of America, hereinafter called the Obligees, in the penal sum of One Hundred Fifty Thousand Seven Hundred Fifty-four and 22/100 (\$150,754.22) dollars for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of this Obligation is such that whereas the principal entered into a certain contract, hereto attached, with the Contractor—Permanente Metals Corporation—dated August 10, 1944, for installation of Degaussing System, Radar System, and all other work covered by Articles 1 to 5 inclusive on face of sub-contract (VS-14) on Hulls

Nos. 557 to 573 inclusive, a total of seventeen (17) vessels under Prime Contract No. MCo-15762, as evidenced by addendum No. 1 to VS-14.

Now therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Contractor—Permanente Metals Corporation—with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then, this obligation to be void otherwise to remain in full force and virtue.

In witness whereof, the above-bounden parties have executed this instrument under their several seals this 28th day of August, 1944, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

[Seal]      /s/ JOHN URQUHART BIRNIE,  
Individual Principal,  
816 West 5th St.,  
Los Angeles 13, Calif.



In presence of—

/s/ G. M. CORREO,  
532 North Gerona Ave.,  
San Gabriel, Calif.

MASSACHUSETTS BONDING  
AND INSURANCE CO.

Corporate Surety,  
458 So. Spring St.,  
Los Angeles 13, Calif.

[Seal] By /s/ CHARLES M. RANDALL,  
Attorney-in-Fact.

Attest:

/s/ LEILA K. SHERIDAN.

The rate of premium on this bond is \$6.65 per thousand.

Total amount of premium charged, \$1,978.72.

(The above must be filled in by corporate surety)

EXHIBIT G

Massachusetts Bonding and Insurance Company  
Home Office, Boston, Massachusetts

Endorsement

Attached to and forming a part of Bond No. C-28504, issued by the Massachusetts Bonding and Insurance Company, on behalf of Birnie Electric Company, of Los Angeles, California, and in favor

of Permanente Metals Corporation and the United States Maritime Commission, as their interests may appear, covering Contract No. MCc-15762, Sub-Contract No. VS-14, and Bond No. C-28589, on behalf of Birnie Electric Company, of Los Angeles, California, and in favor of Permanente Metals Corporation and the United States Maritime Commission, as their interests may appear, covering Addendum No. 1 to Sub-Contract No. VS-14.

It is hereby understood and agreed that said Performance Bonds are increased in the amount of Twenty-five Thousand and No/100ths (\$25,000.00) Dollars, and said Payment Bonds are increased in the amount of Twenty-five Thousand and No/100ths (\$25,000.00) Dollars, being fifty per cent (50%) of Addendum No. 2 in the amount of Fifty Thousand and No/100ths (\$50,000.00) Dollars.

Except as herein specifically modified, the conditions, provisions and limitations of said bonds shall continue unchanged.

Signed, sealed and dated this 31st day of October 1944.

MASSACHUSETTS BONDING  
AND INSURANCE CO.

[Seal] By /s/ M. A. TAYLOR,  
Attorney-in-Fact.

EXHIBIT H

U. S. Standard Form No. 25 (Revised)

Performance Bond  
(Construction or Supply)

Know all Men by these Presents, That we, Birnie Electric Company, as Principal, and Massachusetts Bonding and Insurance Company, a corporation established under the laws of the Commonwealth of Massachusetts and having its principal office in Boston in the said Commonwealth, are held and firmly bound unto The Permanente Metals Corporation and the United States of America represented by the U.S. Maritime Commission as their interests may appear, the penal sum of Eighty-seven Thousand Five Hundred Sixty-six & 38/100ths (\$87,566.38) dollars for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of this Obligation is such, that whereas the principal entered into a certain contract, hereto attached, with the Permanente Metals Corporation, et al., October 19th, 1944, for being Addendum #2 covering increase in price on twenty-two (22) ships covered by contract VS-14 and Addendum #1 for twenty-two (22) AP 5 type Vessels, Numbers 552 to 573 inclusive under Prime Contract Number MCo-15762.

Now therefore, "If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said con-

tract during the original term of said contract and any extensions thereof that may be granted by Permanente Metals Corporation, et al., with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then, this obligation to be void; otherwise to remain in full force and virtue."

In witness whereof, the above-bounden parties have executed this instrument under their several seals this 9th day of November, 1944, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

**BIRNIE ELECTRIC CO.**

[Seal] By /s/ JOHN URQUHART BIRNIE,  
Individual Principal,  
816 West 5th Street,  
Los Angeles 13, Calif.

In presence of—

/s/ G. M. CORREO,  
532 No. Gerona Ave.,  
San Gabriel, Calif.

MASSACHUSETTS BONDING  
AND INSURANCE CO.

Corporate Surety,

458 S. Spring Street,

Los Angeles 13, Calif.

[Seal] by /s/ CHARLES M. RANDALL,  
Attorney-in-Fact.

Attest:

CATHERINE V. WILSON.

The rate of premium on this bond is \$6.65 per thousand.

Total amount of premium charged, \$1,500.31.

(The above must be filled in by corporate surety)

[Endorsed]: Filed July 20, 1946.

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[Title of District Court and Cause.]

ANSWER OF JOHN URQUHART BIRNIE  
AND MASSACHUSETTS BONDING AND  
INSURANCE COMPANY, A CORPORA-  
TION

Comes now John Urquhart Birnie, an individual doing business as Birnie Electric Company and Massachusetts Bonding and Insurance Company, a corporation, and severing from all other defendants in this action and answering the complaint of the plaintiff on file herein, and for answer to the alleged



first cause of action of plaintiff's complaint, admit, deny and allege:

I.

Admit the allegations contained in Paragraph I of the alleged first cause of action of plaintiff's complaint.

II.

Admit the allegations contained in Paragraph II of the alleged first cause of action of plaintiff's complaint.

III.

Admit the allegations contained in Paragraph III of the alleged first cause of action of plaintiff's complaint.

IV.

Answering Paragraph IV of the alleged first cause of action of plaintiff's complaint, defendants allege that they, or either of them do not have sufficient information or belief to enable them to answer said allegations and basing their denial upon said lack of information and belief, deny generally and specifically, each and every, all and singular the allegations therein contained.

V.

Admit the allegations contained in Paragraph V of the alleged first cause of action of plaintiff's complaint.

VI.

Admit the allegations contains in Paragraph V of the alleged first cause of action of plaintiff's

complaint and in that connection defendants allege that on or about November 28, 1944, plaintiff and defendant, John Urquhart Birnie doing business as Birnie Electric Company, made and entered into a certain subcontract in writing designated "Vessels Subcontract No. VS-28" and on April 5, 1945, said parties entered into Addendum No. 1 to said subcontract VS-28, all under United States Maritime Commission Prime Contract No. MCc-15762 which was previously entered into between plaintiff and the United States Maritime Commission. Said subcontract VS-28 was subject to the approval of the United States Maritime Commission and was duly approved by the United States Maritime Commission in writing on or about January 17, 1945. True copies of said subcontract and Addendum No. 1 thereto are attached hereto, marked Exhibit "A" and by reference hereby made a part hereof as though fully set forth herein. Defendants allege that said Addendum No. 1 purports on its face to be executed under and in connection with Prime Contract No. MCc-36452, whereas, in truth and in fact said Addendum No. 1 was executed under and in connection with Prime Contract No. MCc-15762 and was so intended by the parties to said Addendum and said reference therein to Prime Contract MCc-26452 was an inadvertence, misconception and mistake of fact on the part of both parties thereto when executing said Addendum No. 1 to said subcontract VS-28. Defendants further allege that under Vessels Subcontracts Nos. VS-14 and VS-28, by virtue of Article 43 of the "Terms and Conditions"

thereof, all of the terms, covenants and conditions of Prime Contract No. MCc-15762 between the United States Maritime Commission and the plaintiff were adopted, incorporated and made part and parcel of the terms, covenants and conditions of said subcontracts. Said Prime Contract No. MCc-15762, as defendants are informed and believe, and upon such information and belief, allege, was negotiated, made, executed and delivered upon the special instance and request and for the benefit of the United States Navy, acting by and through the Secretary of Navy, his authorized agents, assistants, and employees as a part of and in connection with the emergency naval construction program, authorized by the laws of the United States among which was and is Section 496, Title 34, U. S. C., as amended. The said prime contract and each of said subcontracts contemplated and provided for the construction of complete naval vessels which were intended for and were actually used, employed and commissioned by the United States Navy in or connected with operations against an armed enemy of the United States. Defendants are informed and believe and upon such information and belief allege that the costs of construction of said complete naval vessels under said prime contract and said subcontracts were charged to and paid from Congressional appropriations of public funds of the United States appropriated and designated for expenditure by the Secretary of the Navy in furtherance of the Navy Department's emergency naval vessel construction and building program. Defendants are informed

and believe and upon such information and belief allege that the complete naval vessels constructed under said prime contract and under each of said subcontracts were, upon completion and before acceptance by the United States of America, inspected and tested by a Trial Board appointed under the authority of the Secretary of the Navy.

## VII.

Admit the allegations contained in Paragraph VII of the alleged first cause of action of plaintiff's complaint.

## VIII.

Admit the allegations contained in Paragraph VIII of the alleged first cause of action of plaintiff's complaint.

## IX.

Admit the allegations contained in Paragraph IX of the alleged first cause of action of plaintiff's complaint.

## X.

Defendants deny generally and specifically, each and every, all and singular, the allegations contained in Paragraph X of the alleged first cause of action of plaintiff's complaint and in that connection defendants allege that by virtue of Article 43 of the "Terms and Conditions" of said subcontract VS-14, the terms, covenants and conditions of said Prime Contract No. MCc-15762 were incorporated in and made part and parcel of said subcontract VS-14.



## XI.

Defendants deny generally and specifically, each and every, all and singular, the allegations contained in Paragraph XI of the alleged first cause of action of plaintiff's complaint except that defendants admit that Special Provision No. 4, as set forth in said subcontract VS-14, contains a provision substantially as alleged in said Paragraph XI.

## XII.

Defendants deny generally and specifically, each and every, all and singular, the allegations contained in Paragraph XII of the alleged first cause of action of plaintiff's complaint except that defendants admit that work to be performed by John Urquhart Birnie doing business as Birnie Electric Company under said subcontract VS-14 and the Addenda thereto was completed on or before March 26, 1946. Further answering the allegations contained in said Paragraph XII, defendants allege that the "Stated Contract Price" was the sum of \$432,688.50. Further answering the allegations contained in said Paragraph XII, defendants allege that they, or either of them, do not have sufficient information or belief to enable them to answer plaintiff's allegations respecting the alleged determination of amount by the United States Maritime Commission and basing their denial upon such lack of information and belief deny that at any time, or at all, the United States Maritime Commission or anyone on its behalf made any determination of any nature, or character whatever.



under said Special Provision No. 4, or under any other term, provision, condition or covenant of said subcontract VS-14 or otherwise, and in that connection defendants allege that if said determination was made as alleged in said Paragraph XII, that such was done without right, authority or justification in law and is now and at all times was void and of no force or effect whatever.

### XIII.

Defendants deny generally and specifically, each and every, all and singular, the allegations contained in Paragraph XIII of the alleged first cause of action of plaintiff's complaint except that defendants admit that plaintiff paid the sum of \$389,-419.56 to John Urquhart Birnie doing business as Birnie Electric Company under and in partial performance of plaintiff's obligations of said subcontract VS-14, and there is now due, owing and unpaid from plaintiff to John Urquhart Birnie doing business as Birnie Electric Company the sum of \$43,268.94, thereunder.

### XIV.

Admit the allegations contained in Paragraph XIV of the alleged first cause of action of plaintiff's complaint except that defendants deny that there is now or ever was due or owing or unpaid from either or both of these answering defendants to plaintiff, pursuant to said subcontract VS-14, or any or all of the Addenda thereto, or on any other basis whatever, the sum of \$148,946.57, or

any part thereof, or any other sum at all and defendants allege that there is now due, owing and unpaid from plaintiff to John Urquhart Birnie doing business as Birnie Electric Company the sum of \$43,268.94, under said subcontract and its Addenda as alleged in Paragraph XIII, above.

Answering the Allegations Contained in the Alleged Second and Separate Cause of Action of Plaintiff's Complaint, These Answering Defendants Admit, Deny and Allege

I.

Defendants repeat, reallege and incorporate herein the same as though specifically set forth all of their admissions, denials and allegations contained in Paragraphs I to XIV, inclusive, of their foregoing answer to the alleged first cause of action of plaintiff's complaint.

II.

Defendants admit the allegations contained in Paragraph II of the alleged second cause of action of plaintiff's complaint except that defendants, and each of them, deny that Performance Bond No C-28504 referred to in said Paragraph II or any other bond was made or executed or delivered to plaintiff, or to the United States, or to any Governmental agency, board, commission, representative or agent of the United States, or to any other person, firm or corporation, for the faithful performance, or for any purpose or performance whatever, by John Urquhart Birnie doing business as Birnie

Electric Company, or by any other person, of or in connection with Special Provision No. 4, or any of its subdivisions all as contained and set forth in said subcontract VS-14, (Exhibit "A" to plaintiff's complaint). Defendants and each of them, further deny that said bond was or is by its terms, or otherwise, binding upon or against the principal or the surety, named therein, jointly or severally, or otherwise, or that it has been or is, at all, or at any time, in full or any, force or effect in respect to said Special Provision No. 4, or any of the subdivisions thereof.

### III.

Defendants admit the allegations contained in Paragraph III of the alleged second cause of action of plaintiff's complaint except that defendants, and each of them, deny that Performance Bond No. C-28589 referred to in said Paragraph III or any other bond was made or executed or delivered to plaintiff, or to the United States, or to any Governmental agency, board, commission, representative or agent of the United States, or to any other person, firm or corporation, for the faithful performance, or for any performance whatever, by John Urquhart Birnie doing business as Birnie Electric Company, or by any other person, of or in connection with Special Provision No. 4 or any of its subdivisions all as contained and set forth in said subcontract VS-14. Defendants and each of them, further deny that said bond was or is by its terms, or otherwise, binding upon or against the principal or the surety, named therein, jointly or severally,

or otherwise, or that it has been or is, at all, or at any time in full or any force or effect in respect to said Special Provision No. 4, or any of the subdivisions thereof.

#### IV.

Defendants admit the allegations contained in Paragraph IV of the alleged second cause of action of plaintiff's complaint except that the defendants, and each of them deny that the endorsement to the Bonds Nos. C-28504 and C-28589 referred to in said Paragraph IV or any other endorsement to said Bonds were made, executed or delivered to plaintiff, or to the United States, or to any Governmental agency, board, commission, representative or agent of the United States, or to any other person, firm or corporation, for the faithful performance, or for any performance whatever, by John Urquhart Birnie doing business as Birnie Electric Company or by any other person, of or in connection with Special Provision No. 4 or any of its subdivisions as contained and set forth in said subcontract VS-14. Defendants and each of them, further deny that said endorsement to said bonds was or is by its terms or otherwise, binding upon or against the principal or the surety, named therein, jointly or severally, or otherwise, or that it has been or is, at all, or at any time in full or any force or effect in respect to said Special Provision No. 4 or any of the subdivisions thereof.

#### V.

Defendants admit the allegations contained in Paragraph V in the alleged second cause of action



of plaintiff's complaint except that the defendants, and each of them deny that an unnumbered Performance Bond, dated November 9, 1944, referred to in said Paragraph V or any other bond was made or executed or delivered to plaintiff, or to the United States, or to any Governmental agency, board, commission, representative or agent of the United States or to any other person, firm or corporation, for the faithful performance, or for any performance whatever, by John Urquhart Birnie doing business as Birnie Electric Company, or by any other person, of or in connection with Special Provision No. 4 or any of its subdivisions all as set forth and contained in said subcontract VS-14 or any or all modifications or extensions thereof. Defendants and each of them, further deny that said bond was or is by its terms, or otherwise, binding upon or against the principal or the surety, named therein, jointly or severally, or otherwise, or that it has been or is, at all, or at any time in full or any force or effect in respect to said Special Provision No. 4 or any of the subdivisions thereof.

Answering the Allegations Contained in the Alleged Third and Separate Cause of Action of Plaintiff's Complaint, These Answering Defendants Admit, Deny and Allege

### I.

Defendants repeat, reallege and incorporate herein the same as though specifically set forth all of their admissions, denials and allegations contained in Paragraphs I, II, IV, VI and XIII of their fore-



going answer to the alleged first cause of action of plaintiff's complaint.

## II.

Defendant John Urquhart Birnie doing business as Birnie Electric Company for himself and not for any other defendant in this action, admits the allegations contained in Paragraph II of the alleged third cause of action of plaintiff's complaint and in that connection alleges that the indebtedness therein referred to arose out of, represents, is in connection with, and is based upon the performance of subcontracts VS-14 and VS-28 and their respective Addenda.

## III.

Defendant John Urquhart Birnie doing business as Birnie Electric Company for himself and not for any other defendant in this action, admits the allegations contained in Paragraph III of the alleged third cause of action of plaintiff's complaint except that said defendant denies, for the reason and on the basis of the matters and things set forth in Paragraph III of defendants' fourth distinct separate and affirmative defense herein, that the sum of \$1,546.66, or any part thereof or any sum at all is due or owing or unpaid to plaintiff.

As and for a First Distinct, Separate and Affirmative Defense to Plaintiff's Complaint These Answering Defendants Allege:

## I.

The inclusion of Special Provision No. 4 and all of its subdivisions in subcontract VS-14 referred to

in Paragraph VI of the alleged first cause of action of plaintiff's complaint was the result of an excusable mistake of fact on the part of both the plaintiff and defendant John Urquhart Birnie doing business as Birnie Electric Company. As to said Special Provision No. 4 and all of its subdivisions, there was a complete and total lack of meeting of minds between plaintiff and defendant John Urquhart Birnie doing business as Birnie Electric Company and a complete and total lack of consent by said defendant at the time said subcontract was made, executed and delivered as consent to a contract is defined and provided in and by Chapter III, Title I, Part II of the Civil Code of the State of California. It was not the intention of the parties thereto and particularly of said defendant, that said subcontract VS-14 should contain any provision providing for or in respect to the accounting for or payment to the plaintiff of any profits derived under said subcontract.

## II.

At the time of execution and delivery of said subcontract VS-14 and prior to signature by said defendant, plaintiff through its authorized agent and attorney, who was then acting within the course of his employment and the scope of his authority, represented to said defendant that the terms of said subcontract VS-14 was in full compliance with and were required by existing law, prime contract MCo-15762 (under which said subcontract was written) and all regulations. Said defendant believed such representations which in truth and in fact

plaintiff then knew to be, and they were then, false and untrue with respect to Special Provision No. 4 and all of its subdivisions. Said defendant relied upon such false representations and signed and delivered said subcontract VS-14 to plaintiff, whereas said defendant would not have done so but for said false representations.

### III.

The alleged first cause of action of plaintiff's complaint does not state facts sufficient to constitute a cause of action against either of these answering defendants.

As and for a Second Distinct, Separate and Affirmative Defense to Plaintiff's Complaint These Answering Defendants Allege:

#### I.

That all of the performance bonds and the endorsement thereto and thereon referred to in Paragraphs II, III, IV and V of the alleged second cause of action in plaintiff's complaint were made, executed and delivered to plaintiff in favor of plaintiff, United States of America, and the United States Maritime Commission, as their interests might appear, for the faithful performance by the principal named therein, to wit, John Urquhart Birnie doing business as Birnie Electric Company, of his obligations under subcontract VS-14 and the respective Addenda thereto, (true copies of said last mentioned documents appear as Exhibits "A," "B," "C" and "D" to plaintiff's complaint); saving and excepting however that it was not the purpose of

intention of any of the parties to said bonds and the endorsement thereto and thereon, nor was it the purpose or intention of any of the persons in whose favor said bonds and said endorsement thereon were made, to secure or answer for the alleged and purported, though non-existent, obligation of defendant, John Urquhart Birnie doing business as Birnie Electric Company, under Special Provision No. 4 and the subdivisions thereof, all as set forth in said subcontract VS-14.

## II.

The alleged second cause of action of plaintiff's complaint does not state facts sufficient to constitute a cause of action against either of these answering defendants.

As and for a Third Distinct, Separate and Affirmative Defense to Plaintiff's Complaint These Answering Defendants Allege:

### I.

Defendants replead, reallege and re-incorporate herein the same as though specifically set forth all of the affirmative allegations contained in Paragraph VI of their foregoing answer to plaintiff's alleged first cause of action.

### II.

On July 19, 1946, defendant John Urquhart Birnie doing business as Birnie Electric Company, as plaintiff, filed an action for a declaratory judgment, naming the plaintiff herein as defendant in said action, in the United States District Court, Southern

District of California, Central Division (being action number 5581-PH), wherein and whereby said plaintiff in said action alleged and set forth all of the material matters and things alleged and claimed by plaintiff herein in its alleged first cause of action and in addition thereto said defendant, as plaintiff in said action in said Southern District of California, set forth the making, execution and delivery and performance of said subcontract VS-28 and its Addendum. The issues tendered and the prayer for relief in said action in said Southern District of California seek and pray for a declaration of the rights and obligations of the plaintiff herein and said defendant under both of said subcontracts and their respective Addenda and further, a declaration that plaintiff in said action is not bound or obligated to pay or account to the defendant therein for any profits of any character under said subcontracts VS-14 or VS-28 or their respective Addenda, and the further declaration of the amount owing by the defendant therein to the plaintiff therein on account of performance under said subcontracts and their respective Addenda.

### III.

Said suit in said Southern District of California was filed prior in time, to wit, on July 19, 1946, to the filing of this action on July 20, 1946, and service of process upon the defendant in said other action was had and obtained prior in time to the service of process upon the defendants in this action. More complete, speedier and more adequate relief



can and will be afforded all parties upon the whole controversy in and by virtue of the said other action.

As and for a Fourth Distinct, Separate and Affirmative Defense to Plaintiff's Complaint These Answering Defendants Allege:

### I.

On or about November 28, 1944, defendant, John Urquhart Birnie doing business as Birnie Electric Company, and plaintiff executed and entered into a written subcontract VS-28 and thereafter, on or about April 5, 1945, executed and entered into a written Addendum No. 1 to said subcontract VS-28. True copies of said written subcontract and written Addendum thereto are hereto attached, marked Exhibit "A," and by reference hereby made a part hereof as though fully set forth herein. Said written subcontract VS-28 and its Addendum thereto, Exhibit "A," were signed, executed and delivered by the parties thereto within the State of California. Oscar A. Mellin, who signed and executed said subcontract of November 28, 1944, for and on behalf of said defendant, was at the time of the execution thereof the duly appointed and authorized attorney in fact of said defendant.

### II.

Defendants allege that said Addendum No. 1 purports on its face to be executed under and in connection with Prime Contract No. MCc-36452, whereas, in truth and in fact said Addendum No. 1 was executed under and in connection with Prime

Contract No. MCc-15762 and was so intended by the parties to said Addendum and said reference therein to Prime Contract MCc-36452 was an inadvertence, misconception and mistake of fact on the part of both parties thereto when executing said Addendum No. 1 to said subcontract VS-28.

### III.

Defendant, John Urquhart Birnie doing business as Birnie Electric Company, has fully performed all of the terms, covenants and conditions and has furnished all of the materials required of him by subcontract VS-14 and its Addenda referred to in plaintiff's alleged first cause of action and required of him by said subcontract VS-28 and its Addendum and has in all respects performed his duty thereunder.

### IV.

The stated contract price of subcontract VS-14 and its Addenda (attached as Exhibits "A," "B," "C" and "D" to plaintiff's complaint) was and is the sum of \$432,688.50, of which sum plaintiff has paid to said defendant the sum of \$389,419.56. The stated contract price of subcontract VS-28 and its Addendum (attached hereto as Exhibit "A") was and is the sum of \$153,327.35, of which sum plaintiff has paid to said defendant the sum of \$83,218.50; and there is due, owing and unpaid from plaintiff to defendant, John Urquhart Birnie doing business as Birnie Electric Company, under both of said subcontracts VS-14 and VS-28 and

their respective Addenda, the total sum of \$113,377.79.

As and for a Fifth Distinct, Separate and Affirmative Defense to Plaintiff's Complaint These Answering Defendants Allege:

I.

Defendants replead, reallege and re-incorporate herein the same as though specifically set forth, all of the affirmative allegations contained in Paragraph VI of their foregoing answer to plaintiff's alleged first cause of action.

II.

Said subcontracts VS-14 and VS-28 and their respective Addenda and Prime Contract No. MCc-15762 between plaintiff and the United States Maritime Commission under which said subcontracts were let, covered and provided for the construction of complete naval vessels and portions thereof and said subcontracts and their respective Addenda were entered into in a taxable year to which the excess profits tax provided in Subchapter E of Chapter 2 of the United States Internal Revenue Code was and is applicable and would be applicable if said defendant, as subcontractor, were a corporation and in that connection defendants allege that Section 496 (a), Title 34, U.S.C., is applicable to said subcontracts and their respective Addenda.

Wherefore, defendants pray:

(1) That plaintiff take nothing by virtue of its complaint herein.

(2) That defendant, John Urquhart Birnie doing business as Birnie Electric Company, have judgment against plaintiff in the sum of \$111,832.13, which said last mentioned sum is computed by deducting plaintiff's demand under its alleged third cause of action from the total sum due to said defendant under said defendant's fifth separate, distinct and affirmative defense herein.

(3) That this action and all further steps and proceedings therein be stayed, suspended and abated pending final disposition of action number 5581-PH now pending in the United States District Court, Southern District of California, Central Division.

(4) That defendants be given judgment for their costs herein expended and such other and further relief as to the Court may seem just and proper.

DANA MURDOCK,  
CHARLES P. McCARTHY,  
WILLIAM S. SCULLY,  
HILL, MORGAN & FARRER,  
TINNING & DeLAP,

By /s/ WILLIAM S. SCULLY,  
Attorneys for Answering  
Defendants.

Exhibit A

Subcontract

The Permanente Metals Corporation

Kaiser Company, Inc.

Kaiser Cargo, Inc.

(Shipyard Number Two)

Post Office Box 1072, Richmond, California

United States Maritime Commission

Contract Nos. MCE-15762

Vessels—Subcontract No. VS-28

Date: November 28, 1944

Requisition No. ....

The Permanente Metals Corporation, hereinafter referred to as Contractor, and Birnie Electric Company, with offices located at 816 West 5th Street, Los Angeles, California, hereinafter referred to as Subcontractor, hereby agree that the following work shall be performed for the compensation and upon the terms and conditions hereinafter set forth on the face of this Subcontract, and including Articles 1 through 47 of the Terms and Conditions attached to and made a part of this Subcontract:

Work to Be Performed:

See Appendix "A"

Plans, Drawings and/or Specifications:

See Appendix "A"

Location of Work: All installation work shall be performed at the Contractor's Shipyard No. 2, Richmond, California. However, Subcontractor may do certain fabricating at its own plant.

Items to Be Supplied by Contractor:

See Appendix "A"

Work to Commence: Subcontractor shall commence the aforesaid work as directed by Contractor.

Work to Be Completed: (Time is of the essence of this Subcontract) Subcontractor shall so staff and plan his work and shall work as many hours per day and as many days per week to keep abreast of the Contractor's schedule; all without additional compensation thereof.

Compensation: Subcontractor shall be compensated for the performance of aforesaid work in accordance with the following:

Item 1—Degaussing .....\$8,500.00 per vessel

Item 2—Voice Tube and Whistle ..... 1,200.00 per vessel

Item 3—Mechanical Telegraph ..... 4,000.00 per vessel



Bonds: Required (See Article 23).

Liquidated Damages: None specified.

Special Provisions:

See Appendix "A"

This Subcontract is subject to the approval of the United States Maritime Commission.

THE PERMANENTE METALS CORP.,  
Contractor.

By /s/ T. A. BEDFORD,  
Assistant General Manager.

Approved as to Form:

By /s/ R. K. FRISBIE,  
Contractor's Legal Department.

BIRNIE ELECTRIC COMPANY,  
Subcontractor.

By /s/ JOHN U. BIRNIE,  
Sole Proprietor.

By /s/ OSCAR A. MELLIN,  
His Attorney-in-Fact.

Approved 1/17/45:

UNITED STATES MARITIME  
COMMISSION.

By /s/ C. V. FISHER,  
Material Controller.

Terms and Conditions

Revision No. 2 5-43.

[See Terms and Conditions (Revision No. 2 5-43 set out on pages 22 to 38 of this printed record.)]

Appendix "A"

Work to Be Performed:

Subcontractor shall install the following items on twelve (12) AP-2 Design Vessels, hulls numbered 574 to 580, inclusive, and 597 to 601, inclusive, under Prime Contract No. MCc-15762.

### 1. Degaussing

Subcontractor shall furnish all supervision, labor, equipment and materials except such as may be furnished by the United States Navy, necessary to completely fabricate and install the Degaussing System including degaussing troughs, covers, straps, cables, kick pipes, bulkhead penetrations, junction boxes, control panels, and any other fixtures, parts, or wiring necessary to completely install and operate the system to the satisfaction of the United States Maritime Commission, United States Navy, and the Contractor. Certificate of acceptance by the United States Navy shall be required on each vessel.

### 2. Voice Tube & Whistle

Subcontractor shall furnish all supervision, labor, equipment, and materials except such as may be furnished by the Contractor or the United States Navy, to completely make all straps and hangers required throughout the Voice Tube & Whistle System, and shall mount all equipment that may be required to complete the installation.

### 3. Mechanical Telegraph

Subcontractor shall furnish all supervision, labor, equipment and material except such as may be furnished by the United States Maritime Commission, United States Navy or the Contractor necessary to completely make and install all straps and hangers required throughout the Mechanical Telegraph System, and mount all equipment as may be required to complete the system to the satisfaction of the United States Maritime Commission, the United

### Plans, Drawings and/or Specifications:

Subcontractor shall perform said work in accordance with Plans, Drawings and/or Specifications on file with The Permanente Metals Corporation, Office of the Naval Architect. All changes to said plans, drawings and/or specifications prior to installation and all minor changes shall be made by the Subcontractor at no additional cost to the Contractor.

### Items To Be Supplied by Contractor:

Contractor shall furnish light, power, water, air and crane service; also space for storage of materials required for the work aforesaid and shop space; and such transportation as may be necessary to haul wire reels and heavy parts of equipment within the aforesaid shipyard.

Contractor shall furnish all raw materials required for the Voice Tube & Whistle and Mechanical Telegraph Systems; fabrication of the raw materials furnished shall be the responsibility of the Subcontractor.

### Special Provisions:

1. The Subcontractor shall not be allowed any increase in price from any cause except a major change in designs.

2. Article 17 shall be modified as follows:

(a) By striking the last sentence of Paragraph A.

(b) By inserting in the last sentence of Paragraph B (2), between the words "costs" and "shall," the following: "shall exclude any charge for interest on borrowings, and."

(c) Strike in the last sentence of Paragraph

C, the words "with appropriate adjustment to cover costs of delivery," and insert therefor, "Appropriate adjustment will be made for delivery costs or savings therein."

3. Article 32 shall be modified as follows:

(a) By striking Paragraph A and inserting therefor, "If this subcontract be for maintenance or for vessel construction, and hence covered by Contractor's vessel contract, in the performance of the work hereunder, Subcontractor shall pay the wage rates and observe the other working conditions for like work established by the Contractor in the shipyard and approved by the United States Maritime Commission.

4. Article 45 shall be modified to read as follows:

"Contractor and Subcontractor agree that the work to be performed pursuant to this Subcontract shall be performed at the prices stated on the face of this Subcontract or the maximum ceiling prices under applicable regulations of the Office of Price Administration, whichever are the lower. Subcontractor nevertheless represents, warrants, and certifies that none of the prices, after taking into consideration all factors affecting the final Subcontract price contained in the Subcontract, exceed the maximum prices chargeable and payable under the regulations of the Office of Price Administration and/or any other applicable State or Federal legislation or regulations.

5. Contractor shall pay Subcontractor by monthly payments; said payments shall be based

upon 90% of the sum due on progress estimates made by the Subcontractor and approved by the Contractor. Contractor shall withhold ten per cent (10%) of such sums pending final determination of profits under this subcontract, as hereinafter provided.

6. Outstanding amounts, if any, due at the completion of this subcontract are payable fifteen (15) days after final determination of such amounts as provided in this subcontract.

7. Report of Cost—Excess Profits: The Subcontractor agrees to account for and pay to the Contractor certain profits derived under this contract and for such purposes agrees:

(a) To make a report under oath to the Commission care of the Contractor upon completion of this contract, setting forth in the form prescribed by the Commission the total contract price, the total cost of performing the contract, the amount of Subcontractor's overhead charged to such cost, the net profits and the percentage such net profit bears to the contract price, and such other information as the Commission shall prescribe;

(b) To pay to the Contractor profit as shall be determined by the Commission in excess of ten (10) per cent of the total contract price which amount shall become the sole property of the Commission.

(c) To make no subdivisions of any contract or subcontract for the same article or articles for the purpose of evading the provisions of this Article; and any subdivision of



any contract or subcontract involving an amount in excess of \$10,000 shall be subject to the conditions prescribed in this article; provided that agreements for the purchase of material and/or for the rental of equipment shall not be considered as subdivisions of any contract or subcontract within the meaning of this section;

(d) That the books, files and all other records of the Subcontractor or any holding, subsidiary, affiliated, or associated company, shall at all times be subject to inspection and audit by any person designated by the Contractor or the Commission, and the premises shall at all times be subject to inspection by the agents of the Commission and Contractor.

It is further understood and agreed that the Commission shall prescribe the method of determining the Subcontractor's profits: Provided, that, in computing such profits no salary of more than \$25,000 per year to any individual shall be considered as a part of the cost and no cost will be allowed which, in the judgment of the Commission, is not fair and just or is in excess of a reasonable market price for commodities or goods or services purchased or charged.

Although the accounting for profits and payments to be made under the provisions of this Article shall be in accordance with the provisions of Section 505 (b) of the Merchant Marine Act, 1936, as amended and the regulations of the Commission issued pursuant thereto, the losses incurred in connection with the performance of this contract shall not be used in connection with computing profits

derived under any other contracts that the Subcontractor may have with the Contractor or Commission and losses incurred in connection with such other contracts shall not be used in connection with computing profits derived under this contract, it being understood and agreed that the obligation of the Subcontractor to make payments under this Article is contractual and that such payments shall in effect constitute a reduction of the amount of the contract price which the Contractor is entitled to retain.

Addendum No. 1 to Subcontract No. VS-28

MCc-36452

This Addendum made and entered into this 5th day of April, 1945, by and between The Permanente Metals Corporation, Shipbuilding Division, Richmond, California, hereinafter called the Contractor, and Birnie Electric Company, with offices located at 816 West 5th Street, Los Angeles, California, hereinafter called Subcontractor,

Witnesseth:

Whereas, the parties herein have heretofore entered into Subcontract No. VS-28 whereby Subcontractor agreed to install the degaussing, voice tube and whistle and the mechanical telegraph systems on twelve (12) AP-2 Design Vessels, hulls numbered 574 to 580, inclusive, and 597 to 601, inclusive, under Prime Contract No. MCc-36452; and

Whereas, on hull numbered 597 the Subcontractor furnished the material, layout work and supervision

for the degaussing system only, inasmuch as said hull was transferred from Yard Number Two to Yard Number One for outfitting; and

Whereas, prior to the transfer of hull numbered 597 the Subcontractor completed only 30.91 per cent of the degaussing, listed as Item 1 under the "Work to be Performed" provision of Subcontract No. VS-28;

Now, Therefore, It Is Agreed by and Between the Parties Hereto:

1. Contractor shall pay Subcontractor the sum of \$2,627.35 for the work performed on the degaussing system on hull numbered 597.

2. Except as herein otherwise provided the terms and conditions of Subcontract No. VS-28 shall be unchanged and in full force and effect.

THE PERMANENTE METALS  
CORPORATION,

Contractor.

By /s/ W. F. GEYER,

Administrative Engineer.

Approved as to Form:

By /s/ ROGER SAMS,

Contractor's Legal  
Department.

BIRNIE ELECTRIC  
COMPANY,

Subcontractor.

By /s/ JOHN URQUHART BIRNIE,  
Owner.

State of California,  
County of Los Angeles—ss.

John Urquhart Birnie being first duly sworn, deposes and says: that he is one of the defendants in the above-entitled action; that he has read the foregoing Answer of John Urquhart Birnie and Massachusetts Bonding and Insurance Company, a Corporation, and knows the contents thereto; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true; and that he verifies this Answer on behalf of himself and Massachusetts Bonding and Insurance Company.

/s/ JOHN URQUHART BIRNIE.

Subscribed and sworn to before me this 28th day of August, 1946.

[Seal]     /s/ EDITH E. PELLEGRIN,  
Notary Public in and for the County of Los Angeles,  
State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 29, 1946.

[Title of District Court and Cause.]

FIRST AMENDED COMPLAINT FOR PAYMENT OF MONEY DUE AND AGAINST PRINCIPAL AND SURETY UPON CONTRACT PERFORMANCE BOND

Plaintiff complains of defendants above named, and for a First Cause of Action alleges that:

I.

At all times herein mentioned, plaintiff was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and duly qualified and doing business in the State of California, with its principal place of business in the Northern District of California.

II.

At all times herein mentioned, defendant, John Urquhart Birnie, also sometimes known and referred to as John U. Birnie, was, and now is, a resident of the State of California, and was, and is, doing business in the Northern District of California and elsewhere as Birnie Electric Company.

III.

At all times herein mentioned, defendant, Massachusetts Bonding and Insurance Company, a corporation, was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Massachusetts, and duly qualified and



doing business in the State of California, and particularly in the Northern District of California.

#### IV.

First Doe, Second Doe, Third Doe, First Doe Company, Second Doe Company and Third Doe Company are the fictitious names of defendants whose true names are unknown to plaintiff, and plaintiff asks that when such true names are discovered, that this First Amended Complaint may be amended by inserting such true names in the place and stead of such fictitious names, together with appropriate charging allegations.

#### V.

The amount involved in this litigation exceeds, exclusive of interest and costs, the sum of \$3,000.00.

#### VI.

On or about May 29, 1944, in Contra Costa County, California, in the Northern District of California, plaintiff and defendant, John Urquhart Birnie, doing business as Birnie Electric Company, made and entered into a certain contract in writing, bearing date of May 29, 1944, designated Vessels Subcontract No. VS-14, under United States Maritime Commission Contract No. MCc-15762. Said contract was subject to the approval of the United States Maritime Commission, and was duly approved in writing by the United States Maritime Commission on or about August 3, 1944, in Contra Costa County, California, in said Northern District

of California. A true copy of said contract is attached to the Complaint on file herein as Exhibit A thereto and is hereby referred to and incorporated herein by reference as though fully set forth herein.

## VII.

On or about August 10, 1944, plaintiff and said defendant duly executed an Addendum to said contract designated as Addendum No. 1 to Subcontract No. VS-14. Said Addendum No. 1 was subject to the approval of the United States Maritime Commission, and was duly approved in writing by the United States Maritime Commission on or about September 19, 1944. A true copy of said Addendum No. 1 is attached to the Complaint on file herein as Exhibit B thereto and is hereby referred to and incorporated herein by reference as though fully set forth herein.

## VIII.

On or about October 19, 1944, plaintiff and said defendant duly executed an Addendum to said contract designated as Addendum No. 2 to Subcontract No. VS-14. Said Addendum No. 2 was subject to the approval of the United States Maritime Commission, and was duly approved in writing by the United States Maritime Commission on or about October 28, 1944. A true copy of said Addendum No. 2 is attached to the Complaint on file herein as Exhibit C thereto and is hereby referred to and incorporated herein by reference as though fully set forth herein.

## IX.

On or about November 20, 1944, plaintiff and said defendant duly executed an Addendum to said contract, designated as Addendum No. 3 to Subcontract No. VS-14. Said Addendum No. 3 was subject to the approval of the United States Maritime Commission and was duly approved in writing by the United States Maritime Commission on or about February 27, 1945. A true copy of said Addendum No. 3 is attached to the Complaint on file herein as Exhibit D thereto and is hereby referred to and incorporated herein by reference, as though fully set forth herein.

## X.

Plaintiff has fully and faithfully done and performed all acts and things on its part to be done or performed under said contract and the said Addenda thereto.

## XI.

Said contract contained a Special Provision No. 4, to which reference is hereby made, whereby said defendant agreed to account for and pay to plaintiff profits realized by said defendant in the performance of the contract as determined by the United States Maritime Commission to be in excess of 10% of the total contract price, such amount so paid to become the sole property of the United States Maritime Commission.

## XII.

After said defendant had completed the work to be performed by said defendant under said con-

tract and the Addenda thereto, and on February 25, 1947, the United States Maritime Commission duly and regularly determined, by action of the United States Maritime Commission at Washington, D. C., that the amount of such excess profits under Special Provision No. 4, which said defendant agreed to pay to plaintiff to become the sole property of the United States Maritime Commission, as aforesaid, was the sum of \$190,490.96, computed as follows:

Stated Contract Price.....	\$430,963.95
Cost of Performance.....	197,376.57
Allowable Profit .....	43,096.40
	<hr/>
	\$240,472.99
Recapturable Profits .....	\$190,490.96

Said determination provided that the Secretary of the United States Maritime Commission should notify said defendant of the action of the United States Maritime Commission in making said determination with respect to the excess profits realized under said Subcontract VS-14 and that unless said defendant, within thirty days from the date of notice of such action, should request a hearing with respect to such determination by the United States Maritime Commission, such determination should become final. Pursuant to such provision of said determination, the secretary of the United States Maritime Commission, on or about February 25, 1947, duly notified said defendant of the said action of the United States Maritime Commission, and thereafter and prior to the date of the filing of this First Amended Complaint said defendant duly

waived the right to request a hearing with respect to such determination, and said determination has now become final.

### XIII.

Plaintiff paid to said defendant prior to such determination by the United States Maritime Commission of the amount of excess profits, as aforesaid, the total sum of \$389,419.56, which total sum was \$148,946.57 in excess of said final contract price of \$240,472.99 as determined by the United States Maritime Commission, as aforesaid.

### XIV.

Since said determination by the United States Maritime Commission became final as aforesaid, plaintiff has made a demand upon said defendant for the payment to plaintiff of said sum of \$148,946.57, but said defendant has failed and refused, and still fails and refuses, to pay said sum, or any part thereof, to plaintiff, and there is now due, owing and unpaid from said defendant to plaintiff, pursuant to said Contract No. VS-14 and the Addenda thereto, the sum of \$148,946.57.

Wherefore, plaintiff prays judgment against said defendant as hereinafter requested.

For a Second and Separate Cause of Action, plaintiff alleges that:

#### I.

Plaintiff repleads all of the allegations contained in Paragraphs I to XIV, inclusive, of plaintiff's First Cause of Action, to which reference is hereby



made, and the same are hereby incorporated and referred to in this Second Cause of Action and made a part hereof as though the same were fully set forth herein.

## II.

On or about July 31, 1944, defendant, John Urquhart Birnie, doing business as Birnie Electric Company, as principal, and defendant, Massachusetts Bonding and Insurance Company, as surety, for a valuable consideration, made, executed and delivered to plaintiff a certain Performance Bond No. C-28504, in favor of "The Permanente Metals Corporation and the United States of America represented by the U. S. Maritime Commission as their interest may appear," in the sum of \$44,048.45 to secure the faithful performance by defendant John Urquhart Birnie, doing business as Birnie Electric Company, of said Contract No. VS-14, and all modifications and extensions thereof. Said Performance Bond was, and is, by its terms binding upon said principal and surety, jointly and severally, and has been at all times since said date, and now is, in full force and effect. A true copy of said Performance Bond is attached to the Complaint on file herein as Exhibit E and is hereby incorporated herein by reference as though fully set forth herein.

## III.

On or about August 28, 1944, defendant, John Urquhart Birnie, doing business as Birnie Electric Company, as principal, and defendant, Massachusetts Bonding and Insurance Company, as

surety, for a valuable consideration, made, executed and delivered to plaintiff a certain Performance Bond, No. C-28589, in favor of "The Permanente Metals Corporation and the United States of America represented by the U. S. Maritime Commission as their interest may appear," in the sum of \$150,754.22, to further secure the faithful performance by defendant, John Urquhart Birnie, doing business as Birnie Electric Company, of said Contract No. VS-14 and Addendum No. 1 thereto, and all modifications and extensions thereof. Said Performance Bond was, and is, by its terms binding upon said principal and surety, jointly and severally, and has been at all times since said date, and now is, in full force and effect. A true copy of said Performance Bond is attached to the Complaint on file herein as Exhibit F and is hereby incorporated herein by reference as though fully set forth herein.

#### IV.

On or about October 31, 1944, defendant, Massachusetts Bonding and Insurance Company, for a valuable consideration, made, executed and delivered to plaintiff an Endorsement to be attached to and form a part of said Performance Bond No. C-28504 and said Performance Bond No. C-28589, whereby the coverage of each of said Performance Bonds was, and is, increased by \$25,000.00 to further secure the faithful performance by defendant, John Urquhart Birnie, doing business as Birnie Electric Company, of said Contract VS-14 and the Addenda thereto. Said Endorsement has been at

all times since said date, and now is, in full force and effect. A true copy of said Endorsement is attached to the Complaint on file herein as Exhibit G thereto and is hereby incorporated herein as though fully set forth herein.

## V.

On or about November 9, 1944, defendant, John Urquhart Birnie, doing business as Birnie Electric Company, as principal, and defendant, Massachusetts Bonding and Insurance Company, as surety, for a valuable consideration, made, executed and delivered to plaintiff a certain unnumbered Performance Bond in favor of "The Permanente Metals Corporation and the United States of America represented by the U. S. Maritime Commission as their interest may appear," in the sum of \$87,566.38, to secure the faithful performance by defendant, John Urquhart Birnie, doing business as Birnie Electric Company, of said Contract No. VS-14, and all modifications and extensions thereof. Said Performance Bond was, and is, by its terms binding upon said principal and said surety, jointly and severally, and has been at all times since said date, and now is, in full force and effect. A true copy of said Performance Bond is attached to the Complaint on file herein as Exhibit H thereof and is hereby incorporated herein by reference as though fully set forth herein.

Wherefore, plaintiff prays judgment against said defendants as hereinafter requested.

For a Third and Separate Cause of Action, plaintiff alleges that:

I.

Plaintiff repleads all of the allegations contained in Paragraphs I, II and IV of plaintiff's First Cause of Action, to which reference is hereby made, and the same are hereby incorporated and referred to in this Third Cause of Action and made a part hereof as though the same were fully set forth herein.

II.

Within two years last past, defendant, John Urquhart Birnie, doing business as Birnie Electric Company, became indebted to plaintiff in the sum of \$1,545.66 for the agreed and reasonable value of goods furnished and services rendered by plaintiff to said defendant at said defendant's special instance and request in the County of Contra Costa, in the Northern District of California.

III.

Plaintiff has made demands upon said defendant for the payment of said sum of \$1,545.66, but said defendant has failed and refused to pay the same to plaintiff, and the said sum is now due, owing and unpaid.

Wherefore, plaintiff prays judgment against said defendants as hereinafter requested.

1. Against defendant, John Urquhart Birnie, doing business as Birnie Electric Company, for the sum of \$148,946.57, mentioned in the First Cause

of Action, together with interest upon said sum until paid, as allowed by law.

2. Against defendant, John Urquhart Birnie, doing business as Birnie Electric Company, and defendant, Massachusetts Bonding and Insurance Company, jointly and severally, for the sum of \$148,946.57, mentioned in the said Second Cause of Action, together with interest upon said sum until paid, as allowed by law.

3. Against defendant, John Urquhart Birnie, doing business as Birnie Electric Company, for the sum of \$1,545.66, mentioned in said Third Cause of Action, together with interest upon said sum until paid, as allowed by law.

4. Against defendants for a reasonable sum to be fixed by the Court as and for attorneys' fees for Plaintiff, in accordance with Article 29 of said Contract No. VS-14.

5. For costs of suit, and for such other and further relief as may be proper.

/s/ BRUCE WALKUP,  
/s/ WILLIS S. SLUSSER,  
THELEN, MARRIN, JOHNSON  
& BRIDGES,  
Attorneys for Plaintiff.

[Endorsed]: Filed March 24, 1947.



In the United States District Court, Northern  
District of California, Southern Division

No. 26215 S

THE PERMANENTE METALS CORPORA-  
TION, a Corporation,

Plaintiff,

vs.

JOHN URQUHART BIRNIE, an Individual  
Doing Business as BIRNIE ELECTRIC  
COMPANY, MASSACHUSETTS BONDING  
AND INSURANCE COMPANY, a Corpora-  
tion, FIRST DOE, SECOND DOE, THIRD  
DOE, FIRST DOE COMPANY, SECOND  
DOE COMPANY, THIRD DOE COMPANY,

Defendants.

JOHN URQUHART BIRNIE, an Individual  
Doing Business as BIRNIE ELECTRIC  
COMPANY, and MASSACHUSETTS BOND-  
ING AND INSURANCE COMPANY, a Cor-  
poration,

Defendants and Cross-Complainants,

vs.

THE PERMANENTE METALS CORPORA-  
TION, a Corporation, UNITED STATES  
MARITIME COMMISSION, and JOSEPH  
K. CARSON, RAYMOND S. McKEOUGH,  
ADMIRAL WILLIAM W. SMITH, GRAN-

VILLE MELLON and RICHARD PARK-  
HURST, as Members of UNITED STATES  
MARITIME COMMISSION,

Plaintiff and Cross-Defendants.

ANSWER TO FIRST AMENDED COMPLAINT,  
CROSS-COMPLAINT AND COUNTER-  
CLAIM OF JOHN URQUHART BIRNIE  
AND MASSACHUSETTS BONDING AND  
INSURANCE COMPANY, a Corporation

Come now John Urquhart Birnie, an individual doing business as Birnie Electric Company and Massachusetts Bonding and Insurance Company, a corporation, and severing from all other defendants in this action and answering the first amended complaint of the plaintiff on file herein, and for answer to the alleged first cause of action of plaintiff's first amended complaint, admit, deny and allege:

I.

Defendants have no knowledge of the allegations contained in Paragraph I of the alleged first cause of action of plaintiff's first amended complaint.

II.

Answering Paragraph II of the complaint, defendants admit that the defendant John Urquhart Birnie, also sometimes known and referred to as John U. Birnie, was and at all times mentioned herein and now is a resident of Los Angeles, County of Los Angeles, State of California, and was, prior to the filing of the complaint herein, doing business

in the Northern District of California, and elsewhere, as Birnie Electric Company, but deny that at the time of filing the complaint or at any time subsequent thereto that he was doing business in the Northern District of California as Birnie Electric Company, or otherwise.

### III.

Admit the allegations contained in Paragraph III of the alleged first cause of action of plaintiff's first amended complaint.

### IV.

Defendants have no knowledge of the allegations contained in Paragraph IV of the alleged first cause of action of plaintiff's first amended complaint, and on that ground deny the same.

### V.

Admit the allegations contained in Paragraph V of the alleged first cause of action of plaintiff's first amended complaint.

### VI.

Admit the allegations contained in Paragraph VI of the alleged first cause of action of plaintiff's first amended complaint, and in that connection defendants allege that under Vessel Subcontract No. VS-14, by virtue of Article 43 of the "Terms and Conditions" thereof, all of the terms, covenants, and conditions of Prime Contract No. MCc-15762 between the United States Maritime Commission

and the plaintiff were adopted, incorporated, and made part and parcel of the terms, covenants, and conditions of said subcontract VS-14. Said subcontract VS-14 and said Prime Contract No. MCc-15762 were negotiated, made, executed and delivered as a part of and in connection with the emergency naval construction program, authorized by the laws of the United States, among which were and are the Act of March 27, 1934 (48 Stat. 503, 34 U.S.C.A. 496), and the Act of October 8, 1940 (54 Stat. 1003, 34 U.S.C.A. 496A). The said prime contract was a contract for the construction and manufacture of complete naval vessels. The said subcontract VS-14 was a contract for the construction and manufacture of a portion of said complete naval vessels, namely the installation of equipment in and upon said complete naval vessels as more particularly described in said subcontract and the addenda thereto. That at all times, the vessels covered by said prime contract and said subcontract were constructed for the United States Navy, and the same were upon completion, actually accepted, commissioned, used and employed as complete naval vessels by the United States Navy in or connected with operations against an armed enemy of the United States. That said subcontract VS-14 and its respective Addenda were entered into in a taxable year to which the excess profits tax provided in Subchapter E of Chapter 2 of the United States Internal Revenue Code was and is applicable and would be applicable if the defendant John Urquhart Birnie, doing business as Birnie Electric Company,

as sub-contractor, were a corporation, and in that connection defendants allege that the Act of March 27, 1934 (48 Stat. 503, 34 U.S.C.A. 496), and the Act of October 8, 1940 (54 Stat. 1002, 34 U.S.C.A. 496A), are applicable to said subcontract and its respective Addenda.

## VII.

Admit the allegations contained in Paragraph VII of the alleged first cause of action of plaintiff's first amended complaint.

## VIII.

Admit the allegations contained in Paragraph VIII of the alleged first cause of action of plaintiff's first amended complaint.

## IX.

Admit the allegations contained in Paragraph IX of the alleged first cause of action of plaintiff's first amended complaint.

## X.

Defendants deny generally and specifically, each and every, all and singular, the allegations contained in Paragraph X of the alleged first cause of action of plaintiff's first amended complaint.

## XI.

Answering Paragraph XI of the alleged first cause of action of plaintiff's first amended complaint, defendants admit that said subcontract contains Special Provision No. 4 in the words and



figures as set out in said subcontract, to which reference is hereby made, but deny the implication of the allegations of Paragraph XI of the alleged first cause of action of plaintiff's first amended complaint that said Special Provision No. 4 is effective and is binding on defendant sub-contractor to account for and to pay to plaintiff profits realized by said defendant sub-contractor in the performance of the contract as determined by the United States Maritime Commission to be in excess of 10% of the total contract price, or in any other amount.

## XII.

Answering Paragraph XII of the alleged first cause of action of plaintiff's first amended complaint, defendants deny, both generally and specifically, each and every, all and singular, the allegations contained therein, and allege that if said determination was made as alleged in said Paragraph XII, that such was done without right, authority or justification in law and is now and at all times was void and of no force and effect whatever.

## XIII.

Defendants deny generally and specifically, each and every, all and singular, the allegations contained in Paragraph XIII of the alleged first cause of action of plaintiff's first amended complaint except that defendants admit that plaintiff paid the sum of \$389,419.56 to John Urquhart Birnie, doing business as Birnie Electric Company, under and in

partial performance of plaintiff's obligations of said subcontract VS-14.

#### XIV.

Defendants admit that plaintiff has made a demand upon said defendants for the payment to plaintiff of the sum of \$148,946.57, and admit that said defendants have failed and refused and still fail and refuse to pay said sum or any part thereof to plaintiff, but deny that there is now due, owing and unpaid from said defendants, or either of them, to plaintiff, pursuant to said subcontract VS-14 and the Addenda thereto, the sum of \$148,946.57, or any other sum, or at all.

#### XV.

Further answering the alleged first cause of action of plaintiff's first amended complaint, defendant John Urquhart Birnie, doing business as Birnie Electric Company, has fully performed all of the terms, covenants and conditions and has furnished all of the materials required of him by subcontract VS-14 and its Addenda referred to in plaintiff's alleged first cause of action in plaintiff's first amended complaint. The stated contract price of subcontract VS-14 and its Addenda (attached as Exhibits "A," "B," "C" and "D" to plaintiff's complaint) was and is the sum of \$432,604.83, of which sum plaintiff has paid to said defendant the sum of \$389,419.56; and there is due, owing and unpaid from plaintiff to defendant John Urquhart Birnie, doing business as Birnie Electric Company,

under said subcontract VS-14 and its Addenda, the total sum of \$43,185.27.

## XVI.

Further answering the alleged first cause of action of plaintiff's first amended complaint, defendants allege that this Court is without jurisdiction in that said alleged first cause of action of plaintiff's first amended complaint fails to state a cause of action against these defendants, on the ground of non-joinder of an indispensable and necessary party, to wit, the United States Maritime Commission, in that said United States Maritime Commission has such an interest in the subject matter involved that any final decree rendered herein would materially affect the interest of the United States Maritime Commission for the following reasons:

(a) The United States Maritime Commission is the real party in interest herein as appears from the terms of the contract sued upon, set forth in Paragraphs VI and XI of the alleged first cause of action of plaintiff's first amended complaint, more particularly in this, that any amount paid as claimed by plaintiff is to become the sole property of the United States Maritime Commission; that as a result thereof, the United States Maritime Commission, representing the United States, has a direct interest in the outcome of this action and is, therefore, an indispensable and a necessary party.

(b) That defendants, John Urquhart Birnie and the Massachusetts Bonding & Insurance Company, are informed and believe and, basing their allegations upon such information and belief, allege that

the acts of plaintiff, The Permanente Metals Corporation, seeking to recover money from the defendant, John Urquhart Birnie, among which was the filing of this action, were and are being done and performed by plaintiff, The Permanente Metals Corporation, solely and exclusively on behalf of and at the direct instance and request and under the sole and exclusive direction and control of the United States Maritime Commission; that the plaintiff, The Permanente Metals Corporation, in these respects is acting as agent of the United States Maritime Commission, with full and complete authority to do so; and that this action is, in these circumstances, being brought by the United States Maritime Commission against the defendants, John Urquhart Birnie doing business as Birnie Electric Company, and the Massachusetts Bonding & Insurance Company.

Answering the Allegations Contained in the Alleged Second and Separate Cause of Action of Plaintiff's First Amended Complaint, These Answering Defendants Admit, Deny and Allege:

I.

Defendants repeat, reallege and incorporate herein the same as though specifically set forth all of their admissions, denials and allegations contained in Paragraphs I to XIV, inclusive, of their foregoing answer to the alleged first cause of action of plaintiff's first amended complaint.



## II.

Defendants admit the allegations contained in Paragraph II of the alleged second cause of action of plaintiff's first amended complaint except that defendants, and each of them, deny that Performance Bond No. C-28504 referred to in said Paragraph II or any other bond was made or executed or delivered to plaintiff, or to the United States, or to any Governmental agency, board, commission, representative or agent of the United States, or to any other person, firm or corporation, for the faithful performance, or for any purpose or performance whatever, by John Urquhart Birnie, doing business as Birnie Electric Company, or by any other person, of or in connection with Special Provision No. 4, or any of its subdivisions, all as contained and set forth in said subcontract VS-14 (Exhibit "A" to plaintiff's complaint). Defendants and each of them further deny that said bond was or is by its terms, or otherwise, binding upon or against the principal or the surety named therein, jointly or severally, or otherwise, or that it has been or is at all, or at any time, in full or any force or effect in respect to said Special Provision No. 4, or any of the subdivisions thereof.

## III.

Defendants admit the allegations contained in Paragraph III of the alleged second cause of action of plaintiff's first amended complaint except that defendants, and each of them, deny that Performance Bond No. C-28589 referred to in said Para-



graph III, or any other bond, was made or executed or delivered to plaintiff, or to the United States, or to any Governmental agency, board, commission, representative or agent of the United States, or to any other person, firm or corporation for the faithful performance, or for any performance whatever, by John Urquhart Birnie, doing business as Birnie Electric Company, or by any other person, of or in connection with Special Provision No. 4 or any of its subdivisions, all as contained and set forth in said subcontract VS-14. Defendants and each of them further deny that said bond was or is by its terms, or otherwise, binding upon or against the principal or the surety named therein, jointly or severally, or otherwise, or that it has been or is at all or at any time in full or any force or effect in respect to said Special Provision No. 4, or any of the subdivisions thereof.

#### IV.

Defendants admit the allegations contained in Paragraph IV of the alleged second cause of action of Plaintiff's first amended complaint except that defendants, and each of them, deny that the endorsement to the Bonds Nos. C-28504 and C-28589 referred to in said Paragraph IV, or any other endorsement to said Bonds were made, executed or delivered to plaintiff, or to the United States, or to any Governmental agency, board, commission, representative or agent of the United States, or to any other person, firm or corporation, for the faithful performance, or for any performance whatever, by John Urquhart Birnie, doing business as Birnie

Electric Company, or by any other person, of or in connection with Special Provision No. 4 or any of its subdivisions all as contained and set forth in said subcontract VS-14. Defendants, and each of them, further deny that said endorsement to said bonds was or is by its terms, or otherwise, binding upon or against the principal or the surety named therein, jointly or severally, or otherwise, or that it has been or is, at all or at any time in full or any force or effect in respect to said Special Provision No. 4 or any of the subdivisions thereof.

## V.

Defendants admit the allegations contained in Paragraph V of the alleged second cause of action of plaintiff's first amended complaint except that the defendants, and each of them, deny that an unnumbered Performance Bond, dated November 9, 1944, referred to in said Paragraph V or any other bond was made or executed or delivered to plaintiff, or to the United States, or to any Governmental agency, board, commission, representative or agent of the United States or to any other person, firm or corporation, for the faithful performance, or for any performance whatever, by John Urquhart Birnie, doing business as Birnie Electric Company, or by any other person, of or in connection with Special Provision No. 4 or any of its subdivisions all as set forth and contained in said subcontract VS-14 or any or all modifications or extensions thereof. Defendants and each of them further deny that said bond was or is by its terms, or otherwise,

binding upon or against the principal or the surety named therein, jointly or severally, or otherwise, or that it has been or is at all or at any time in full or any force or effect in respect to said Special Provision No. 4 or any of the subdivisions thereof.

## VI.

Further answering the alleged second cause of action of plaintiff's first amended complaint defendants allege that all of the performance bonds and the endorsement thereto and thereon referred to in Paragraphs II, III, IV and V of the alleged second cause of action in plaintiff's first amended complaint were made, executed and delivered to plaintiff in favor of plaintiff, United States of America, and the United States Maritime Commission, as their interests might appear, for the faithful performance by the principal named therein, to wit, John Urquhart Birnie, doing business as Birnie Electric Company, of his obligations under subcontract VS-14 and the respective Addenda thereto (true copies of said last mentioned documents appear as Exhibits "A," "B," "C" and "D" to plaintiff's complaint); saving and excepting, however, that it was not the purpose or intention of any of the parties to said bonds and the endorsement thereto and thereon, nor was it the purpose or intention of any of the persons in whose favor said bonds and said endorsement thereon were made, to secure or answer for the alleged and purported, though non-existent, obligation of defendant John Urquhart Birnie, doing business as Birnie Electric Company, under Special

Provision No. 4 and the subdivision thereof, all as set forth in said subcontract VS-14.

## VII.

Further answering the alleged second cause of action of plaintiff's first amended complaint, defendants allege that this Court is without jurisdiction of said alleged second cause of action of plaintiff's first amended complaint and that the same fails to state a cause of action for the reason that the United States Maritime Commission is not joined as a party to said first amended complaint. The United States Maritime Commission is an indispensable party to plaintiff's first amended complaint for the reason that plaintiff, The Permanente Metals Corporation, and the United States Maritime Commission have a joint interest in the alleged claim for recovery on the bonds referred to in the said alleged second cause of action thereof, which bonds are appended thereto as Exhibits "E," "F," "G" and "H" and which, on their face, are in favor of "The Permanente Metals Corporation and the United States Maritime Commission, as their interests may appear."

Answering the Allegations Contained in the Alleged Third and Separate Cause of Action of Plaintiff's First Amended Complaint, These Answering Defendants Admit, Deny and Allege:

### I.

Defendants repeat, reallege and incorporate herein the same as though specifically set forth all of their



admissions, denials and allegations contained in Paragraphs I, II, IV, VI and XIII of their foregoing answer to the alleged first cause of action of plaintiff's first amended complaint.

## II.

Defendnt John Urquhart Birnie, doing business as Birnie Electric Company, for himself and not for any other defendant in this action, admits the allegations contained in Paragraph II of the alleged third cause of action of plaintiff's first amended complaint.

## III.

Defendant John Urquhart Birnie, doing business as Birnie Electric Company, for himself and not for any other defendant in this action, admits the allegations contained in Paragraph III of the alleged third cause of action of plaintiff's first amended complaint, except that said defendant denies that the sum of \$1,546.66, or any part thereof, or any sum at all, is due or owing or unpaid to plaintiff.

For a First Counterclaim and Cross-Complaint Against The Permanente Metals Corporation and Against United States Maritime Commission, the Cross-Complainant John Urquhart Birnie, Doing Business as Birnie Electric Company, Alleges:

## I.

That cross-complainant, John Urquhart Birnie, is now, and was at all times herein mentioned, a resident of the State of California and doing business



in the City of Los Angeles, County of Los Angeles, in said State of California under said name, a business of which defendant and cross-complainant was the sole owner and proprietor.

II.

That at all times mentioned herein the cross-defendant, The Permanente Metals Corporation, was and is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and duly qualified and doing business in the State of California with its principal place of business in the northern district of California.

III.

That Joseph K. Carson, Raymond S. McKeough, Admiral William W. Smith, Granville Mellon and Richard Parkhurst are now the duly appointed, qualified and acting members of the United States Maritime Commission.

IV.

That the jurisdiction of this honorable court depends on a diversity of citizenship between the parties hereto and that the value of the matters involved in this suit is in excess of the sum of \$3,000.00, exclusive of interest and costs.

V.

That on or about May 29, 1944, the cross-complainant, John Urquhart Birnie, and cross-defendant, The Permanente Metals Corporation executed and entered into a written contract denominated

Vessels Subcontract VS-14 and, thereafter, on or about August 10, 1944, entered into a written addendum to said contract, and on or about October 19, 1944, entered into a second written addendum to said contract, and on or about November 20, 1944, entered into a third written addendum to said contract. That true copies of said contract and written addenda thereto are attached to plaintiff's first amended complaint as Exhibits "A," "B," "C" and "D" thereof and are incorporated herein by reference and made a part hereof as though fully set forth herein. That said written subcontract and written addenda thereto were all signed, executed and delivered by both cross-complainant, John Urquhart Birnie, and cross-defendant, The Permanente Metals Corporation, within the State of California.

## VI.

That cross-complainant, John Urquhart Birnie, has fully performed all of the terms, covenants and conditions of, and has furnished all of the materials required of him by, said subcontract.

## VII.

That the stated contract price of the said subcontract was and is the sum of \$432,604.83, of which sum cross-defendant, The Permanente Metals Corporation, has paid to said cross-complainant the sum of \$389,419.56; and there is now due, owing and unpaid from cross-defendant, The Permanente Metals Corporation, to cross-complainant, John Urquhart

Birnie, under said subcontract, the total sum of \$43,185.27.

### VIII.

That cross-complainant is informed and believes, and therefore alleges, that by virtue of a certain prime contract between cross-defendant, The Permanente Metals Corporation, and the United States Maritime Commission, in accordance with which said subcontract VS-14 was signed, executed and delivered, and the terms of which were incorporated therein, the United States Maritime Commission promised and agreed to pay to cross-complainant, John Urquhart Birnie, the sum of \$43,185.27. That there is now due, owing and unpaid from cross-defendant, the United States Maritime Commission, to cross-complainant, John Urquhart Birnie, the said sum of \$43,185.27.

For a second cross-complaint and counterclaim against cross-defendant, The Permanente Metals Corporation, and against cross-defendant, United States Maritime Commission, John Urquhart Birnie, doing business as Birnie Electric Company, alleges:

### I.

Repleads and realleges all of the allegations contained in Paragraphs I through IV of cross-complainant's first cross-complaint and counterclaim, to which reference is hereby made, and the same are herein incorporated and referred to in the second counterclaim and cross-complaint and made a part hereof as if the same were fully set forth herein.

## II.

That on or about November 28, 1944, the cross-complainant, John Urquhart Birnie, and cross-defendant, The Permanente Metals Corporation, executed and entered into a written contract denominated Vessels Subcontract VS-28 and, thereafter, on or about April 5, 1945, executed and entered into a written addendum to said contract. That true copies of said written contract and written addendum thereto are hereto attached, marked Exhibit "A," and hereby are made a part hereof as fully as if set forth herein. That said written contract and written addendum thereto, Exhibit "A," were all signed, executed and delivered by both cross-complainant and cross-defendant, The Permanente Metals Corporation, within the State of California.

## III.

That cross-complainant, John Urquhart Birnie, has fully performed the work required of him and furnished all the materials required of him and fulfilled all the conditions required of him by said Exhibit "A," and has in all respects performed his duty thereunder.

## IV.

That the stated contract price of the said subcontract, Exhibit "A," was and is the sum of \$153,327.35, of which sum cross-defendant, The Permanente Metals Corporation, has paid to said cross-complainant the sum of \$83,218.50; and there is now

due, owing and unpaid from cross-defendant, The Permanente Metals Corporation, to cross-complainant, John Urquhart Birnie, under said subcontract, the total sum of \$70,108.85.

## V.

That cross-complainant is informed and believes, and therefore alleges, that by virtue of a certain prime contract between cross-defendants, The Permanente Metals Corporation, and the United States Maritime Commission, in accordance with which said subcontract, Exhibit "A," was signed, executed and delivered, and the terms of which were incorporated into said Exhibit "A," the United States Maritime Commission promised and agreed to pay to cross-complainant, John Urquhart Birnie, the sum of \$70,108.85. That there is now due, owing and unpaid from cross-defendant, United States Maritime Commission, to cross-complainant, John Urquhart Birnie, the said sum of \$70,108.85.

For a third cross-complaint and counterclaim against cross-defendant, The Permanente Metals Corporation, and against cross-defendant, United States Maritime Commission, John Urquhart Birnie, doing business as Birnie Electric Company, and the Massachusetts Bonding & Insurance Company, allege:

## I.

Replead and reallege the allegations contained in Paragraphs I through VII in cross-complainant



John Urquhart Birnie's first cross-complaint and counterclaim, and Paragraphs II, III and IV in defendant and cross-complainant's second cross-complaint and counterclaim, to which reference is hereby made, and the same are hereby incorporated and referred to and made a part hereof as if fully set forth herein.

## II.

That the nature of this complaint is a procedure for a declaratory judgment under Section 274-D, United States Judicial Code, for the purpose of determining a question in actual controversy between the parties, to wit, the question of the construction and interpretation of a written contract as hereinafter set forth.

## III.

That between July 31, 1944, and November 9, 1944, cross-complainants John Urquhart Birnie, as principal, and the Massachusetts Bonding & Insurance Company, as surety, for valuable consideration made, executed and delivered to cross-defendant, The Permanente Metals Corporation, four performance bonds all in favor of "The Permanente Metals Corporation and the United States of America, represented by and United States Maritime Commission, as their interests may appear," to secure the faithful performance by cross-complainant, John Urquhart Birnie, of the said subcontract VS-14. That true copies of said performance bonds are attached to plaintiff's first amended complaint on file herein as Exhibits "E," "F," "G" and "H,"

and by reference are made a part hereof as though fully set forth herein.

#### IV.

That said subcontracts VS-14 and VS-28 were subcontracts under a certain prime contract between the cross-defendant, The Permanente Metals Corporation, and cross-defendant, United States Maritime Commission. That by virtue of the express terms of said subcontracts VS-14 and VS-28, all the terms, covenants and conditions of the said prime contract between cross-defendant and cross-complainant were adopted and incorporated into the aforementioned subcontract.

That the said prime contract and the said subcontracts were negotiated, made and executed as a part of the Emergency Naval Construction Program authorized by the laws of the United States, among which were and are the Act of March 26, 1934 (48 Stat. 503, 34 U.S.C.A. 496), and the Act of October 8, 1940 (54 Stat. 1002, 34 U.S.C.A. 496A). That the said prime contract between cross-defendant, The Permanente Metals Corporation, and cross-defendant, United States Maritime Commission, was a contract for the construction and manufacture of complete naval vessels.

That the aforementioned subcontracts VS-14 and VS-28 between cross-complainant, John Urquhart Birnie, and the cross-defendant, The Permanente Metals Corporation, were contracts for the construction or manufacture of a portion of certain of said complete naval vessels, namely, the installation of equipment in and upon said naval vessels.

## V.

That a controversy and dispute have arisen between cross-defendant, The Permanente Metals Corporation, and the cross-complainants, John Urquhart Birnie and the Massachusetts Bonding & Insurance Company, under and out of the said sub-contract VS-14. That the controversy and dispute concern and involve the provisions of Paragraph 4 and subdivision (b) thereof in the case of said contract VS-14, and the provisions of Paragraph 7 and subdivision (b) thereof in the case of said contract VS-28.

The cross-defendant, The Permanente Metals Corporation, contends and asserts that the said provisions of Paragraph 4 and subdivision (b) thereof of said contract VS-14, and said Paragraph 7 and subdivision (b) thereof of said contract VS-28 with reference to payment by cross-complainant, John Urquhart Birnie, to the cross-defendant, The Permanente Metals Corporation, of all profits to cross-complainant, John Urquhart Birnie, under said contract as shall be determined by the United States Maritime Commission to be in excess of ten per cent of the total contract prices, such profits to become the sole property of the United States Maritime Commission, are valid and in effect. Cross-defendant, The Permanente Metals Corporation, has demanded of cross-complainant, John Urquhart Birnie, that he pay to the cross-defendant the sum of \$148,946.57 as such excess profits due under said contract VS-14.

Further, cross-defendant, The Permanente Metals Corporation, asserts and claims that under and by

virtue of the terms and conditions of the aforementioned bonds the Massachusetts Bonding & Insurance Company is bound jointly and severally with cross-complainant, John Urquhart Birnie, to account for and pay to the cross-defendant, The Permanente Metals Corporation, the excess profits allegedly due under the provisions of Paragraph 4 and subdivision (b) thereof.

Cross-complainants, John Urquhart Birnie and the Massachusetts Bonding & Insurance Company in the case of VS-14, and the cross-complainant, John Urquhart Birnie in the case of VS-28, contend and assert that the said provisions calling for payment of said excess profits, said payment to become the sole property of the United States Maritime Commission, are void and without effect under and by virtue of Section 401 of Title IV of the Second Revenue Act of 1940 (54 Stat. 1003, 34 U.S.C.A. 496A).

Further, cross-complainant, Massachusetts Bonding & Insurance Company, contends and asserts that, without regard to the effectiveness and validity of the provisions of Paragraph 4, subdivision (b), for any purpose, the terms and provisions of the aforementioned bonds in no event require it to pay as surety any part of such excess profits as are allegedly due, and that it was not the intention of any of the parties to the aforementioned bonds that the Massachusetts Bonding & Insurance Company should be liable for the faithful performance by cross-complainant, John Urquhart Birnie, of any such provisions.



Cross-complainants, John Urquhart Birnie and Massachusetts Bonding & Insurance Company, in the case of said contract VS-14, and cross-complainant, John Urquhart Birnie, in the case of said contract VS-28, contend and assert that the said contracts, VS-14 and VS-28, and the prime contract under which said VS-14 and VS-28 were subcontracts, were and are contracts for the construction and manufacture of complete naval vessels and portions thereof, and were entered into in a taxable year to which the excess profits tax provided in subchapter E of chapter 2 of the United States Internal Revenue Code is applicable and would be applicable if the sub-contractor, to wit, cross-complainant John Urquhart Birnie, were a corporation; that said Paragraph 4, subdivision (b) thereof in said VS-14, and Paragraph 7, subdivision (b) thereof in VS-28, are void and of no effect by reason of the statute above referred to; and that, therefore, cross-complainants John Urquhart Birnie and Massachusetts Bonding & Insurance Company, or either of them, are not obligated to pay to cross-defendant, The Permanente Metals Corporation, or to the United States Maritime Commission through The Permanente Metals Corporation, any profits made by cross-complainant, John Urquhart Birnie, in excess of ten per cent of the total contract price of said contract, or in any amount. And that, on the contrary, cross-defendant, The Permanente Metals Corporation, and the cross-defendant, United States Maritime Commission, are indebted to cross-complainant, John Urquhart Birnie, in the amount of



\$113,377.79 on account of work done and materials furnished by cross-complainant, John Urquhart Birnie, to the cross-defendant under and in accordance with the provisions of said contracts, VS-14 and VS-28.

## VI.

That cross-complainants, John Urquhart Birnie and the Massachusetts Bonding & Insurance Company, are informed and believe and, basing their allegations upon such information and belief, allege that by virtue of the provisions of the contracts as set forth in the foregoing Paragraph V, the cross-defendant, United States Maritime Commission, is the only party to be benefitted by any recovery under the terms of the contracts. That the cross-defendant, United States Maritime Commission, is the real party in interest.

## VII.

That cross-complainants, John Urquhart Birnie and the Massachusetts Bonding & Insurance Company, are informed and believe and, basing their allegations upon such information and belief, allege that the acts of cross-defendant, The Permanente Metals Corporation, seeking to recover money from the cross-complainant, John Urquhart Birnie, among which was the filing of this action, were and are being done and performed by cross-defendant, The Permanente Metals Corporation, solely and exclusively on behalf of and at the direct instance and request and under the sole and exclusive direction and control of the cross-defendant, United States

Maritime Commission; that the cross-defendant, The Permanente Metals Corporation, in these respects is acting as agent of the cross-defendant, United States Maritime Commission, with full and complete authority to do so; and that this action is, in these circumstances, being brought by the United States Maritime Commission against the cross-complainants, John Urquhart Birnie, doing business as Birnie Electric Company, and the Massachusetts Bonding & Insurance Company.

Wherefore, defendants and cross-complainants pray :

1. That plaintiff and cross-defendant, The Permanente Metals Corporation, and the cross-defendant, United States Maritime Commission, or either of them, take nothing by virtue of the first amended complaint on file herein;

2. That defendant and cross-complainant, John Urquhart Birnie, doing business as Birnie Electric Company, have judgment against plaintiff and cross-defendant, The Permanente Metals Corporation, and cross-defendant, United States Maritime Commission, in the sum of \$111,832.13;

3. That the court declare the rights and obligations of plaintiff and cross-defendants and defendants and cross-complainants under said contracts VS-14 and VS-28;

4. That the court find and declare that Paragraph 4 and subdivision (b) thereof of said contract VS-14 and Paragraph 7 and subdivision (b) thereof of said contract VS-28 are void and without effect; and that defendant and cross-complainant, John

Urquhart Birnie, doing business as Birnie Electric Company, and defendant and cross-complainant, Massachusetts Bonding & Insurance Company, or either of them, are not bound or obligated to pay to plaintiff and cross-defendant or to cross-defendant, United States Maritime Commission, profits in excess of ten per cent of the total contract price of said contracts VS-14 and VS-28, or either of them, or any profits or any money whatsoever;

5. That the court find and declare the amount owing by plaintiff and cross-defendant to defendant and cross-complainant, John Urquhart Birnie, doing business as Birnie Electric Company, for and on account of defendant and cross-complainant John Urquhart Birnie's performance of said contracts VS-14 and VS-28, and find and declare the amount owing by cross-defendant, United States Maritime Commission, to defendant and cross-complainant, John Urquhart Birnie, arising therefrom;

6. That defendants and cross-complainants, John Urquhart Birnie, doing business as Birnie Electric Company, and the Massachusetts Bonding & Insurance Company, be given judgment for their costs and disbursements in this action, and for any other and further relief which to the court may seem just and proper.

HILL, MORGAN & FARRER,  
TINNING & DeLAP,  
MELLIN AND HANSCOM,

By /s/ OSCAR A. MELLIN,

Attorneys for Defendants and  
Cross-Complainants.

Receipt of a copy of the within Answer to First Amended Complaint, Cross-Complaint and Counterclaim of John Urquhart Birnie and Massachusetts Bonding and Insurance Company, a corporation, is hereby acknowledged this 7th day of April, 1947.

BRUCE WALKUP,  
WILLIS S. SLUSSER,  
THELEN, MARRIN, JOHNSON  
& BRIDGES,

By /s/ BRUCE WALKUP,  
Attorneys for Plaintiff and  
Cross-Defendants.

United States of America,  
Northern District of California,  
Southern Division—ss.

John Urquhart Birnie, being first duly sworn, deposes and says: That he is the defendant in the above-entitled action; that he has read the foregoing Answer, Cross-Complaint and Counterclaim, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ JOHN URQUHART BIRNIE.

Subscribed and sworn to before me this 2nd day of April, 1947.

[Seal] /s/ E. L. STIMPSON,  
Notary Public in and for the County of Los Angeles,  
State of California.

My Commission expires Jan. 30, 1950.

EXHIBIT "A"

Subcontract

United States Maritime Commission

Contract Nos. MCc-15726

[See pages 79-80 of this printed record]:

Terms and Conditions

Revision No. 2 5-43

[See pages 22 to 38 of this printed record.]

[Endorsed]: Filed April 9, 1947.

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[Title of District Court and Cause.]

ANSWER OF THE PERMANENTE METALS  
CORPORATION, A CORPORATION, TO  
COUNTERCLAIM AND CROSS-COM-  
PLAINT OF JOHN URQUHART BIRNIE,  
AN INDIVIDUAL DOING BUSINESS AS  
BIRNIE ELECTRIC COMPANY, AND  
MASSACHUSETTS BONDING AND  
INSURANCE COMPANY, A CORPORA-  
TION

Plaintiff and cross-defendant, The Permanente Metals Corporation, a corporation, for itself and not for any other cross-defendant in this action, answers the first counterclaim and cross-complaint as follows:

I.

Answering Paragraph I, admits that cross-complainant, John Urquhart Birnie, is now and was at all times therein mentioned, a resident of the State of California. Cross-defendant is without knowledge sufficient to enable it to answer the remaining allegations of said paragraph.



## II.

Admits the allegations of Paragraph II.

## III.

Admits the allegations of Paragraph III.

## IV.

Admits the allegations of Paragraph IV.

## V.

Admits the allegations of Paragraph V.

## VI.

Answering Paragraph VI, admits that cross-complainant, John Urquhart Birnie, has furnished all of the materials required of him by said subcontract; denies that cross-complainant, John Urquhart Birnie, has fully performed all of the terms, covenants, and conditions of said subcontract and in this connection alleges that cross-complainant, John Urquhart Birnie, has failed to pay to cross-defendant, The Permanente Metals Corporation, the excess profits in the sum of \$148,946.57 realized by cross-complainant, John Urquhart Birnie, in the performance of the subcontract, as determined by United States Maritime Commission, as more particularly set forth in the first cause of action of the amended complaint on file herein, and has otherwise failed to perform and comply with the requirements of Paragraph 4 of said subcontract.

## VII.

Answering Paragraph VII, denies that the stated contract price of the said subcontract was and is

the sum of \$432,688.50, and in this connection alleges that the stated contract price of the said subcontract was and is the sum of \$430,963.95. Admits that cross-defendant, The Permanente Metals Corporation, has paid to cross-complainant, John Urquhart Birnie, the sum of \$389,419.56. Denies that there is now due, owing or unpaid from cross-defendant, The Permanente Metals Corporation, to cross-complainant, John Urquhart Birnie, under said subcontract or otherwise, the total sum of \$43,268.94, or any other sum whatsoever, and in this connection alleges that there is now due, owing and unpaid from cross-complainant John Urquhart Birnie to cross-defendant, The Permanente Metals Corporation, under and pursuant to said subcontract, the sum of \$148,946.57, as more particularly set forth in the first cause of action of the first amended complaint herein.

### VIII.

Denies the allegations of Paragraph VIII and denies that there is now due, owing and unpaid from cross-defendant, United States Maritime Commission, to cross-complainant, John Urquhart Birnie, the sum of \$43,268.94, or any other sum whatever.

Plaintiff and cross-defendant, The Permanente Metals Corporation, a corporation, for itself and not for any other cross-defendant in this action, answers the second counterclaim and cross-complaint as follows:

## I.

Answering Paragraph I, cross-defendant repleads all of its answers to Paragraphs I through IV of cross-complainants' first cross-complaint and counterclaim by reference as though the same were fully set forth herein.

## II.

Admits the allegations of Paragraph II.

## III.

Answering Paragraph III, admits that cross-complainant, John Urquhart Birnie, has furnished all of the materials required to be furnished by him under said subcontract VS-28, and, except as herein expressly admitted, denies the remaining allegations of said paragraph.

## IV.

Answering Paragraph IV, admits that the stated contract price of said subcontract VS-28 was and is the sum of \$153,327.35; admits that cross-defendant, The Permanente Metals Corporation, has paid to cross-complainant, John Urquhart Birnie, the sum of \$83,218.50; denies that there is now due, owing or unpaid from cross-defendant, The Permanente Metals Corporation, to cross-complainant, John Urquhart Birnie, under said subcontract VS-28, or otherwise, the total sum of \$70,108.85, and in this connection alleges: Said subcontract VS-28 contained a Special Provision No. 7, to which reference is hereby made, whereby cross-complainant, John Urquhart Birnie, agreed to account for and

pay to cross-defendant, The Permanente Metals Corporation, profits realized by cross-complainant, John Urquhart Birnie, in the performance of said subcontract, as determined by the United States Maritime Commission to be in excess of ten per cent of the total contract price, such amounts so paid to become the sole property of the United States Maritime Commission. After cross-complainant, John Urquhart Birnie, had completed the work to be performed by cross-complainant, John Urquhart Birnie, under said subcontract VS-28 and the Addendum thereto, and on February 25, 1947, the United States Maritime Commission duly and regularly determined by action of the United States Maritime Commission at Washington, D. C., that the amount of such excess profits under Special Provision No. 7, which cross-complainant, John Urquhart Birnie, agreed to pay to cross-defendant, The Permanente Metals Corporation, to become the sole property of the United States Maritime Commission as aforesaid, was the sum of \$35,421.26, computed as follows:

Stated Contract Price .....	\$153,327.35
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Cost of Performance .....	\$102,573.35
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Allowable Profit .....	15,332.74
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Total .....	\$117,906.09
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Recapturable Profits .....	\$ 35,421.26
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Said determination provided that the Secretary of the United States Maritime Commission should notify cross-complainant, John Urquhart Birnie, of

the action of the United States Maritime Commission in making said determination with respect to the excess profits realized under said sub-contract VS-28 and that unless cross-complainant, John Urquhart Birnie, within thirty days from the date of the notice of such action should request a hearing with respect to such determination by the United States Maritime Commission, such determination should become final. Pursuant to such provision of such determination, the Secretary of the United States Maritime Commission, on or about February 25, 1947, duly notified cross-complainant, John Urquhart Birnie, of the said action of the United States Maritime Commission and thereafter and prior to the date of the filing of the first amended complaint herein, cross-complainant, John Urquhart Birnie, duly waived the right to request a hearing with respect to such determination and said determination has now become final.

Alleges that cross-defendant, The Permanente Metals Corporation, is now indebted to cross-complainant, John Urquhart Birnie, in the sum of \$34,687.59 under said subcontract VS-28 but alleges that said sum of \$34,687.59 is being lawfully withheld by cross-defendant, The Permanente Metals Corporation, from cross-complainant, John Urquhart Birnie, as an offset against the sum of \$148,946.57 and the further sum of \$1,545.66 owed to cross-defendant, The Permanente Metals Corporation, by cross-complainant, John Urquhart Birnie, as more particularly alleged in the first amended complaint herein.



V.

Denies the allegations of Paragraph V and denies that there is now due, owing and unpaid from cross-defendant, United States Maritime Commission, to cross-complainant, John Urquhart Birnie, the sum of \$70,108.85, or any other sum whatsoever.

Plaintiff and cross-defendant, The Permanente Metals Corporation, a corporation, for itself and not for any other cross-defendant in this action, answers the third counterclaim and cross-complaint as follows:

I.

Answering Paragraph I, cross-defendant, The Permanente Metals Corporation, repleads all of its answers to Paragraphs I through VII of the first cross-complaint and counterclaim and Paragraphs II, III and IV of the second cross-complaint and counterclaim by reference, as though the same were fully set forth herein:

II.

Admits the allegations of Paragraph II.

III.

Admits the allegations of Paragraph III.

IV.

Answering Paragraph IV, admits that said subcontracts VS-14 and VS-28 were subcontracts under a certain prime contract or certain prime contracts between cross-defendant, The Permanente Metals

Corporation, and cross-defendant, United States Maritime Commission. Denies that by virtue of the express terms of said subcontracts VS-14 and VS-28, all of the terms, covenants and conditions of the said prime contract or prime contracts between cross-defendant, The Permanente Metals Corporation, and cross-defendant, United States Maritime Commission, were adopted and incorporated into the said subcontracts except as provided by Article 43 of the Terms and Conditions of Subcontracts VS-14 and VS-28 with reference to Prime Contract MCE-15762, and to the extent, if any, that the terms, covenants and conditions of Prime Contract MCE-36452 may be incorporated by virtue of the reference thereto in Addendum No. 1 to Subcontract VS-28. Except as herein expressly admitted or alleged, denies all of the remaining allegations in said paragraph.

V.

Answering Paragraph V, admits and alleges that a controversy and dispute has arisen and now exists between cross-defendant, The Permanente Metals Corporation, and cross-complainants, John Urquhart Birnie and Massachusetts Bonding and Insurance Company, under and out of said subcontracts VS-14 and VS-28. Admits that said controversy and dispute concerns and involves, among other things, the provisions of paragraph 4 and subdivision (b) thereof in the case of subcontract VS-14, and the provisions of Paragraph 7 and subdivision (b) thereof in the case of subcontract VS-28. Admits that cross-defendant, The Permanente Metals

Corporation, contends and asserts, among other things, that subcontract VS-14 and subcontract VS-28 are valid and in effect and that the provisions of paragraph 4 of subcontract VS-14 and paragraph 7 of subcontract VS-28 are likewise valid and in effect. Admits and alleges further that cross-defendant, The Permanente Metals Corporation, has demanded of cross-complainant, John Urquhart Birnie, and of cross-complainant, Massachusetts Bonding and Insurance Company, that they pay to cross-defendant the sum of \$148,946.57 as excess profits due under subcontract VS-14. Further admits and alleges that cross-defendant, The Permanente Metals Corporation, asserts and claims that under and by virtue of the terms and conditions of the said bonds, Massachusetts Bonding and Insurance Company is bound jointly and severally with cross-complainant, John Urquhart Birnie, to account for and pay to cross-defendant, The Permanente Metals Corporation, the excess profits due under the provisions of paragraph 4 of subcontract VS-14 and paragraph 7 of subcontract VS-28. Further answering said paragraph and particularly the allegations thereof commencing on line 17, page 20 and ending on line 3, page 22, admits that cross-complainant, Massachusetts Bonding and Insurance Company, contends and asserts as therein alleged and that cross-complainant, John Urquhart Birnie, contends and asserts as therein alleged, and except as herein expressly admitted and alleged, denies all of the remaining allegations in said paragraph.

## VI.

Answering the allegations of Paragraph VI, denies that cross-defendant, United States Maritime Commission, is the only party to be benefitted by any recovery under the terms of said subcontracts and in this connection alleges that cross-defendant, United States Maritime Commission, contends and asserts that cross-defendant, The Permanente Metals Corporation, is obligated to collect such excess profits as determined by the United States Maritime Commission from Cross-complainant, John Urquhart Birnie, such excess profits, when collected from cross-complainant, John Urquhart Birnie, by cross-defendant, The Permanente Metals Corporation, to be the sole property of United States Maritime Commission. Denies that cross-defendant, United States Maritime Commission, is the real party in interest and in this connection alleges that cross-complainant, John Urquhart Birnie, contracted with cross-defendant, The Permanente Metals Corporation, by said subcontracts VS-14 and VS-28 to pay to cross-defendant, The Permanente Metals Corporation, for the benefit of the United States Maritime Commission, such excess profits and did not contract to pay such excess profits directly to United States Maritime Commission. Except as herein expressly admitted and alleged, denies the remaining allegations of said paragraph.

## VII

Answering Paragraph VII, denies all of the allegations thereof.



## VIII.

As a further defense to said third cross-complaint and counterclaim, defendant alleges as follows:

All of the alleged issues upon which defendants and cross-complainants seek a declaratory judgment are involved in and necessarily will be determined by the Court herein in the disposition of the issues raised by the amended complaint and the answer of defendants and cross-complainants thereto, and the first two cross-complaints and counterclaims and the answer of cross-defendants thereto, and there is, therefore, no necessity for this Court to undertake to render a declaratory judgment upon such issues. An adjudication in the cross-complaint and counterclaim for declaratory judgment will not settle the whole controversy between the parties but will settle only some of the issues in dispute between the parties, leaving the balance of the issues for determination in the other causes of action set forth in the amended complaint and the cross-complaint herein, thereby resulting in a piecemeal determination of all the matters in controversy between the parties. The affirmative relief in damages sought by the various parties hereto can be obtained most expeditiously and effectively by the granting by the Court of the prayer for affirmative relief in damages of the party entitled thereto as found by the Court rather than by the granting by the Court of a judgment of declaratory relief declaring the respective rights of the parties.

Wherefore, plaintiff and cross-defendant, The Permanente Metals Corporation, prays:



(1) That defendants and cross-complainants, John Urquhart Birnie and Massachusetts Bonding and Insurance Company, take nothing by virtue of their cross-complaint and counterclaim herein;

(2) That plaintiff and cross-defendant, The Permanente Metals Corporation, have judgment against defendants and cross-complainants, John Urquhart Birnie, doing business as Birnie Electric Company, and Massachusetts Bonding and Insurance Company, as requested in the first amended complaint on file herein;

(3) That plaintiff and cross-defendant, The Permanente Metals Corporation, have judgment for its costs of suit herein incurred and for such other and further relief as may be proper.

By /s/ BRUCE WALKUP,  
WILLIS S. SLUSSER,  
THELEN, MARRIN,  
JOHNSON & BRIDGES,

By /s/ BRUCE WALKUP,  
Attorneys for Plaintiff and Cross-Defendant, The  
Permanente Metals Corporation, a Corporation.

Receipt of a copy of the written answer is acknowledged this 2nd day of September, 1947.

[Endorsed]: Filed Sept. 5, 1947.

[Title of District Court and Cause.]

ANSWER OF CROSS-DEFENDANT UNITED  
STATES MARITIME COMMISSION TO  
COUNTER-CLAIM AND CROSS-COM-  
PLAINT OF JOHN URQUHART BIRNIE

Cross-Defendant United States Maritime Com-  
mission answers the first counter-claim and cross-  
complaint as follows:

I.

Cross-Defendant does not have sufficient informa-  
tion or belief to answer the allegations of Para-  
graph I and demands strict proof thereof.

II.

Admits the allegations of Paragraph II.

III.

Admits the allegation sof Paragraph III.

IV.

Denies the allegations of Paragraph IV.

V.

Admits the allegations of Paragraph V.

VI.

Answering Paragraph VI, admits that Cross-  
Complainant John Urquhart Birnie has furnished  
all of the materials required of him by said sub-  
contract: Denies that Cross-Complainant John

Urquhart Birnie has fully performed all of the terms, covenants and conditions of said subcontract, and in this connection alleges, upon information and belief, that Cross-Complainant John Urquhart Birnie has failed to pay to Cross-Defendant The Permanente Metals Corporation excess profits in the sum of \$148,946.57, realized by Cross-Complainant John Urquhart Birnie in the performance of the subcontract as determined by Cross-Defendant United States Maritime Commission.

## VII.

Answering Paragraph VII, denies that the stated contract price of the said subcontract was and is the sum of \$432,688.50, and in this connection alleges that the stated contract price of the said subcontract was and is the sum of \$430,963.95; admits that Cross-Defendant The Permanente Metals Corporation has paid to Cross-Complainant John Urquhart Birnie the sum of \$389,419.56; Denies that there is now due, owing or unpaid from Cross-Defendant The Permanente Metals Corporation to Cross-Complainant John Urquhart Birnie under said subcontract, or otherwise, the total sum of \$43,268.94, or any other sum whatsoever.

## VIII.

Denies the allegations of Paragraph VIII, and denies that there is now due, owing and unpaid from Cross-Defendant United States Maritime

Commission to Cross-Complainant John Urquhart Birnie the sum of \$43,268.94, or any other sum whatsoever.

Cross-Defendant United States Maritime Commission answers the second counter-claim and cross-complaint as follows:

I.

Answering Paragraph I, Cross-Defendant repleads all of its answers to Paragraphs I through IV of Cross-Complainant's first counter-claim and cross-complaint by reference as though the same were fully set forth herein.

II.

Admits the allegations of Paragraph II.

III.

Answering Paragraph III, admits that Cross-Complainant John Urquhart Birnie has furnished all of the materials required to be furnished by him under said subcontract VS-28, and, except as herein expressly admitted, denies the remaining allegations of said Paragraph.

IV.

Answering Paragraph IV, admits that the stated contract price of the said subcontract VS-28 was and is the sum of \$153,327.35. Admits that Cross-Defendant The Permanente Metals Corporation has paid to said Cross-Complainant John Urquhart Birnie the sum of \$83,218.50; Denies that there is

now due, owing or unpaid from the Cross-Defendant The Permanente Metals Corporation to Cross-Complainant John Urquhart Birnie under said sub-contract VS-28, or otherwise, the total sum of \$70,108.85, or any part thereof, except the sum of \$34,687.59, which Cross-Defendant is informed and believes is being lawfully withheld by Cross-Defendant The Permanente Metals Corporation from Cross-Complainant John Urquhart Birnie as an off-set.

#### V.

Denies the allegations of Paragraph V and denies that there is now due, owing and unpaid from Cross-Defendant United States Maritime Commission to Cross-Complainant John Urquhart Birnie the sum of \$70,108.85, or any part thereof.

Cross-Defendant United States Maritime Commission answers the third counter-claim and cross-complaint as follows:

#### I.

Answering Paragraph I, Cross-Defendant United States Maritime Commission repleads all of its answers to Paragraphs I through VII of the first counter-claim and cross-complaint, and Paragraphs II, III, and IV of the second counter-claim and cross-complaint, by reference as though the same were fully set forth herein.

#### II.

Denies the allegations of Paragraph II.



III.

Admits the allegations of Paragraph III.

IV.

Answering Paragraph IV, admits that said sub-contracts VS-14 and VS-28 were subcontracts under a certain prime contract or certain prime contracts between Cross-Defendant The Permanente Metals Corporation and Cross-Defendant United States Maritime Commission, and, except as herein expressly admitted, denies the remaining allegations of said Paragraph.

V.

Denies the allegations of Paragraph V: Denies that Cross-Defendant United States Maritime Commission is indebted to Cross-Complainant John Urquhart Birnie in the sum of \$113,377.79, or any part thereof.

VI.

Denies the allegations of Paragraph VI.

VII.

Denies the allegations of Paragraph VII.

Wherefore, Cross-Defendant United States Maritime Commission prays:

I.

That Defendants and Cross-Complainants take nothing by virtue of their counter-claims and cross-complaints herein.

II.

That Cross-Defendant United States Maritime Commission have judgment for its costs of suit

herein incurred, and for such other and further relief as may be proper.

/s/ FRANK J. HENNESSY,  
United States Attorney.

/s/ C. ELMER COLLETT,  
Assistant United States Attorney, Attorneys for  
Cross-Defendant United States Maritime Commission.

[Endorsed]: Filed Mar. 11, 1948.

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[Title of District Court and Cause.]

### ORDER

It is Ordered that plaintiff have judgment against defendant John Urquhart Birnie in the sum of \$1,545.66 with legal interest, and against defendants John Urquhart Birnie and Massachusetts Bonding & Insurance Company, a corporation in the sum of \$148,946.57 less \$34,687.59 held as a set-off by plaintiff, for a total of \$114,258.98, with legal interest, attorneys' fees in the sum of \$15,000, and for costs of suit herein.

Plaintiff shall prepare findings of fact and conclusions of law in compliance with the local rules.

Dated: July 20th, 1950.

/s/ DAL M. LEMMON,  
U. S. District Judge.

[Endorsed]: Filed July 20, 1950.

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial, and the Court having heard the evidence and considered the stipulations and admissions of the parties, finds the facts and states the conclusions of law as follows:

### Findings of Fact

1. Plaintiff and cross-defendant The Permanente Metals Corporation, hereinafter called "Permanente," was and is a Delaware Corporation, and during the period of time involved in this action was engaged in the business of ship construction at Richmond, California, in the Northern District of California, under construction contracts with the United States Maritime Commission.

2. Defendant and cross-complainant John Urquhart Birnie, hereinafter called "Birnie," was and is a citizen and resident of California and during the period of time involved in this action was engaged in the electrical business in the Northern District of California, doing business as Birnie Electric Company, of which Company he was sole owner.

3. Defendant and cross-complainant Massachusetts Bonding and Insurance Company, hereinafter called "the Bonding Company," was and is a Massachusetts corporation engaged in business in the Northern District of California.

4. Cross-defendant United States Maritime Com-

mission, hereinafter called "the Commission," was and is an agency of the United States.

5. The amount involved in this litigation exceeds, exclusive of interest and costs, the sum of \$3,000.00.

6. On or about April 22, 1943, Permanente and the Commission entered into a written prime contract designated Contract MCc 15762, hereinafter called "the Prime Contract," whereby Permanente agreed, as prime contractor, to construct for the Commission 77 vessels designated as Commission hulls Nos. 525 to 601, inclusive.

7. Said Prime Contract was entered into by the Commission under the authority of Public Laws 247 and 630 of the 77th Congress.

8. Such 77 vessels covered by the Prime Contract were steel hulled, steam-propulsive powered, cargo carrying vessels of the Commission design VC2-S-AP2, such vessels being commonly known as, and hereinafter called "AP2s." Such design, "VC2-S-AP2," designates a Victory Cargo vessel, between 400 and 450 feet long, steam-propulsion, second modification of the AP class of vessel under the Commission's system of letter designations. The Commission's letter designation "AP" is an identifying letter classification assigned to this particular class of vessel. Such AP2s were designed by the Commission in collaboration with an independent naval architect and marine engineer and were basically merchant cargo carrying vessels, designed for use in the United States Merchant Marine.

9. Said Prime Contract was amended by an Addendum No. 1 thereto, dated November 2, 1944, by an Addendum No. 2 thereto, dated December 7, 1944, by an Addendum No. 3 thereto, dated April 1, 1945, and by an Addendum No. 4 thereto, dated June 5, 1947.

10. By said Addendum No. 2, Permanente agreed, among other things, to construct 22 of the vessels included under the Prime Contract, and being Commission hulls Nos. 552 to 573, inclusive, as troop ships in accordance with Commission design VC2-S-AP5, such vessels being commonly known as, and hereinafter called "AP5s," rather than as AP2s in accordance with Commission design VC2-S-AP2.

11. Such 22 AP5s, Commission hulls Nos. 552 to 573, inclusive, covered by said Addendum No. 2, were steel hulled, steam-propulsive powered, cargo carrying vessels of Commission design VC2-S-AP5. Said design "VC2-S-AP5" designates a Victory Cargo vessel, between 400 and 450 feet long, steam-propulsion, fifth modification of the AP class of vessel under the Commission's said system of letter designations. Such AP5s were designed by the Commission in collaboration with an independent naval architect and marine engineer. Such AP5s were basically merchant cargo carrying vessels, designed for use in the United States Merchant Marine, with conversion features suitable to equip them as naval auxiliaries in time of war. The design of the AP5s was basically the same as the design of the AP2s, but with additional



conversion features to make such vessels suitable for carrying troops in time of war. Such conversion features did not affect the basic design common to the AP2s and AP5s as cargo carrying merchant vessels, and in the designing of the AP5s the Commission held such conversion features to a practical minimum so as not to destroy the value of said AP5s for rehabilitation to cargo vessels for peacetime use. Many of the AP5s constructed for the Commission have been restored to merchant cargo vessels after use in carrying troops during wartime.

12. Such AP5s, Commission hulls Nos. 552 to 573, inclusive, were constructed by Permanente for the Commission under Commission construction standards and specifications, which differed in some respects from the construction standards of the Navy Department, the latter being much more stringent than those customarily used to construct merchant cargo vessels. Each of the vessels under said Prime Contract was required to be built under standards of the American Bureau of Shipping which applied to commercial vessels and differed from the Navy Department Standards.

13. Such 22 AP5s, Commission hulls Nos. 552 to 573, inclusive, were delivered by Permanente upon completion into the custody, control, and possession of the Commission, and title to said AP5s was vested in the Commission at all times during construction and to and including the time of such delivery. Permanente was paid by the Commission for the construction of said AP5s in accordance

14. On or about May 29, 1944, Permanente and Birnie entered into a written subcontract under said Prime Contract, such subcontract being designated as Vessels Subcontract No. VS-14, hereinafter called "VS-14." Said VS-14 provided that it was subject to approval by the Commission and it was duly approved by the Commission.

15. Said VS-14 was amended by an Addendum No. 1 thereto, dated August 10, 1944, and by an Addendum No. 2 thereto, dated October 19, 1944, and by an Addendum No. 3 thereto, dated November 20, 1944. Each such Addendum provided that it was subject to approval by the Commission and was duly approved by the Commission.

16. Under said VS-14, as amended by said Addenda thereto, Birnie agreed, as subcontractor, to install certain features of an electrical nature upon said 22 AP5s, Commission hulls Nos. 552 to 573, inclusive. In VS-14 the vessels were designated as "Single Screw Cargo Vessel—U.S.M.C. Design VC2-S-AP5." The said features to be installed by Birnie were Degaussing, Radar, Voice Tube, Mechanical Telegraph, and Mechanical Wireways. Such features to be installed by Birnie upon said AP5s were substantially the same features as those installed upon the AP2s constructed under said Prime Contract, with the exception of Radar, which was not a feature of said AP2s. Installation of such items on vessels during wartime was not limited to installation on combatant type vessels or vessels of the United States Navy, but such items were commonly installed on merchant cargo vessels

which would be used under wartime conditions. Practically all cargo vessels were equipped with certain safety features during wartime and contained features such as guns, gun crew emplacements, degaussing systems, voice tubes, and mechanical telegraphs.

17. Said VS-14 contained a Special Provision No. 4, hereinafter called "Special Provision No. 4," which provided, in part, as follows:

"4. Report of Cost—Excess Profits: The Subcontractor (Birnie) agrees to account for and pay to the Contractor (Permanente) certain profits derived under this contract, and for such purposes agrees:

"(a) To make a report under oath to the Commission care of the Contractor upon completion of this contract, setting forth in the form prescribed by the Commission the total contract price, the total cost of performing the contract, the amount of Subcontractor's overhead charged to such cost, the net profits and the percentage such net profit bears to the contract price, and such other information as the Commission shall prescribe;

"(b) To pay to the Contractor profit as shall be determined by the Commission in excess of ten (10) per cent of the total contract price which amount shall become the sole property of the Commission.

"(c) To make no subdivisions of any contract or subcontract for the same article or articles for the purpose of evading the provi-

sions of this Article; and any subdivision of any contract or subcontract involving an amount in excess of \$10,000 shall be subject to the conditions prescribed in this article; provided that agreements for the purchase of material and/or for the rental of equipment shall not be considered as subdivisions of any contract or subcontract within the meaning of this section;

“(d) That the books, files and all other records of the Subcontractor or any holding, subsidiary, affiliated, or associated company, shall at all times be subject to inspection and audit by any person designated by the Contractor or the Commission, and the premises shall at all times be subject to inspection by the agents of the Commission and Contractor.

“It is further understood and agreed that the Commission shall prescribe the method of determining the Subcontractor's profits: Provided, that, in computing such profits no salary of more than \$25,000 per year to any individual shall be considered as a part of the cost and no cost will be allowed which, in the judgment of the Commission, is not fair and just or is in excess of a reasonable market price for commodities or goods or services purchased or charged.

Although the accounting for profits and payments to be made under the provisions of this Article shall be in accordance with the provisions of Section 505 (b) of the Merchant



Marine Act, 1936, as amended and the regulations of the Commission issued pursuant thereto, the losses incurred in connection with the performance of this contract shall not be used in connection with computing profits derived under any other contracts that the Subcontractor may have with the Contractor or Commission and losses incurred in connection with such other contracts shall not be used in connection with computing profits derived under this contract, it being understood and agreed that the obligation of the Subcontractor to make payments under this Article is contractual and that such payments shall in effect constitute a reduction of the amount of the contract price which the Contractor is entitled to retain."

18. Permanente has done and performed all acts and things required on its part to be done or performed under VS-14 and the Addenda thereto.

19. Birnie has done and performed all acts and things required on his part to be done or performed under VS-14 and the Addenda thereto, except with respect to the performance of Birnie's obligations to account for and repay excess profits under Special Provision No. 4, and to pay attorney's fees under Article 29 thereof.

20. Birnie did not make a report under oath to the Commission in care of Permanente upon completion of VS-14 as required by Subdivision (a) of Special Provision No. 4.

21. After Birnie completed the work to be performed by him under VS-14 and the Addenda



thereto, and on February 25, 1947, the Commission made a determination, pursuant to Special Provision No. 4, that the amount of excess profits which Birnie agreed to repay to Permanente, to become the sole property of the Commission, was the sum of \$190,-490.96, computed as follows:

Contract Price.....		\$430,963.95
Cost of Performance.....	\$197,376.59	
Allowable Profit (10% of		
Contract Price).....	43,096.40	240,472.99
	<hr/>	<hr/>
Recapturable Profits.....		\$190,490.96

22. Said determination by the Commission as to the amount of excess profits provided that the Secretary of the Commission should notify Birnie of the action of the Commission in making said determination and that unless Birnie, within 30 days from the date of notice of such determination, should request a hearing with respect to such determination, such determination should become final. On or about March 3, 1947, the Secretary of the Commission notified Birnie of said determination and Birnie did not thereafter within said 30 day period request a hearing with respect to such determination and such determination became final. The amount of such determination is correct.

23. Prior to the making of such determination of excess profits by the Commission, Permanente paid to Birnie under VS-14 the sum of \$389,419.56. Such sum paid was \$148,946.57 in excess of \$240,-472.99, the total amount due to Birnie, as determined by the Commission under VS-14.

24. Thereafter, and on or about March 20, 1947, Permanente made a demand upon Birnie and the Bonding Company for the payment to Permanente of said sum of \$148,946.57, representing excess profits, but Birnie and the Bonding Company refused to pay any part of said sum to Permanente.

25. Said VS-14 contained a Term and Condition, designated as Article 29, which provided as follows:

“Attorneys’ Fees: Subcontractor (Birnie) hereby agrees to pay to Contractor (Permanente) a reasonable sum as attorneys’ fees in all court actions brought by either of them against the other or in which they are both plaintiffs or defendants, and also in court actions involving offsetting claims between Subcontractor and Contractor, because of any doubts, disputes or actions arising out of this Subcontract, except in the following cases:

“(a) When Subcontractor obtains a favorable net judgment against Contractor, after consideration of claims and offsets of Contractor which are allowed by the court against Subcontractor, for breach of this Subcontract;

“(b) When Contractor is denied a favorable judgment by a court in any suit against Subcontractor which may be brought by Contractor.”

In this action Permanente is plaintiff and cross-defendant and Birnie is defendant and cross-complainant, and this action involves offsetting claims between Permanente and Birnie under VS-14.

26. Permanente employed as its attorneys to

represent it in this action Messrs. Bruce Walkup and Willis S. Slusser, and the firm of Thelen, Marrin, Johnson & Bridges. Said attorneys performed extensive services in connection with said action covering a period of time commencing in August, 1945, and continuing to the present time. \$15,000.00 is a reasonable sum to be awarded to Permanente as its attorneys' fees pursuant to said Article 29 of VS-14.

27. Said VS-14 contained a Term and Condition designated as Article 23, which provided as follows:

“Bond: If required by this Subcontract, as indicated on the face of this Subcontract, Subcontractor (Birnie) agrees to furnish two separate bonds, one for ‘Performance’ coverage in the amount of 50% of the Subcontract compensation, and the other for ‘Payment’ coverage in the amount of 50% of the Subcontract compensation, the two together being equal to 100% of the Subcontract compensation. The latest revision of Government Standard Form 25 (‘Performance’) and Form 25-A (‘Payment’) shall be used, and the bonds shall be issued by a bonding company on the approved list of the Treasury Department (Form 356). The United States Maritime Commission as well as the Contractor (Permanente) shall be named as Obligee on the bonds. Such bonds shall be executed and delivered to the Contractor before any work is commenced under this Subcontract. Subcontractor shall pay and solely bear the cost of all premiums on such bonds.”

Said VS-14 contained a further provision which specified that such bonds referred to in said Article 23 were required under VS-14.

28. On VS-14 Birnie agreed to furnish Permanente and the Commission, as their interests may appear, a Performance Bond of the kind described in Finding of Fact 27, and which would guarantee, among other things, Birnie's performance of his obligations under Special Provision No. 4 and under Article 29 of VS-14.

29. On or about July 31, 1944, and pursuant to the requirements of VS-14 and Article 23 thereof referred to in Findings of Fact 27, Birnie, as principal, and the Bonding Company, as surety, for a valuable consideration made, executed, and delivered to Permanente a Performance Bond on United States Standard Form No. 25 (Revised) (Construction or Supply), designated as No. C-28504, in the amount of \$44,048.45, which provided, in part, as follows:

“That we, Birnie Electric Company of 816 W. 5th Street, Los Angeles 13, California, as Principal, and Massachusetts Bonding and Insurance Company, a corporation established under the laws of the Commonwealth of Massachusetts and having its principal office in Boston in the said Commonwealth, as Surety, are held and firmly bound unto The Permanente Metals Corporation and the United States of America represented by the U. S. Maritime Commission as their interest may appear, in the penal sum of Forty-four Thousand Forty-eight & 45/100



(\$44,048.45) dollars for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

“The Condition of This Obligation Is Such, that whereas the principal entered into a certain contract, hereto attached, with The Permanente Metals Corporation, dated May 29, 1944, for installation of Degaussing System, Radar System, and all other work covered by Articles 1 to 5 inclusive on face of sub-contract (VS-14) on Hulls Nos. 552 to 556, inclusive, a total of five (5) vessels under Prime Contract No. MCc-15762.

“Now Therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by The Permanente Metals Corporation, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then, this obligation to be void; otherwise to remain in full force and virtue.”

30. On or about August 28, 1944, and pursuant to



the requirements of VS-14 and Article 23 thereof referred to in Finding of Fact 27, Birnie, as principal, and the Bonding Company, as surety, for a valuable consideration, made, executed, and delivered to Permanente a Performance Bond in similar form to said Performance Bond No. C-28504, but which was designated as Performance Bond No. C-28589, and was in the amount of \$150,754.22 and related to work under Addendum No. 1 to VS-14 on Commission hulls Nos. 557 to 573 inclusive.

31. On or about October 31, 1944, and pursuant to the requirements of VS-14 and Article 23 thereof referred to in Finding of Fact 27, the Bonding Company for a valuable consideration made, executed, and delivered to Permanente an Endorsement to be attached to and form a part of said Performance Bond No. C-28504 and said Performance Bond No. C-28589, which Endorsement increased the amount of Performance Bonds No. C-28504 and No. C-28589 in the amount of \$25,000.00 under Addendum No. 1 to VS-14.

32. On or about November 9, 1944, and pursuant to the requirements of VS-14 and Article 23 thereof referred to in Finding of Fact 27, Birnie, as principal, and the Bonding Company, as surety, for a valuable consideration made, executed, and delivered to Permanente a Performance Bond in similar form to said Performance Bonds No. C-28504 and No. C-28589, but which was dated November 9, 1944, and was in the amount of \$87,566.38 and related to work under Addendum No. 2 to VS-14 on Commission hulls Nos. 552 to 573 inclusive.

33. Each of said Performance Bonds and said Endorsement referred to in Findings of Fact 29, 30, 31 and 32 has been at all times after its execution and delivery in full force and effect.

34. By the Performance Bonds and Endorsement referred to in Findings of Fact 29, 30, 31 and 32 the Bonding Company, as surety agreed to be liable, among other things, for the faithful performance by Birnie of his obligation under Special Provision No. 4 to repay said excess profits as determined by the Commission, and under Article 29 of VS-14 to pay attorneys' fees as provided in said Article 29.

35. An actual controversy and dispute has arisen between Permanente, on the one hand, and Birnie and the Bonding Company, on the other hand, under and out of VS-14 and said performance bond and endorsements. The controversy and dispute concern and involve the provisions of Special Provision No. 4 with respect to the repayment by Birnie to Permanente of excess profits realized by Birnie under VS-14 and the liability of the bonding company.

Permanente contends and asserts: (1) That Special Provision No. 4 of VS-14 is valid and in effect; and (2) That under and by virtue of the terms and conditions of said Performance Bonds and Endorsement the Bonding Company is jointly and severally liable with Birnie to account for and pay to Permanente the excess profits due under Special Provision No. 4 of VS-14.

Birnie and the Bonding Company contend and assert: (1) That said Prime Contract was negotiated, made, and executed as a part of the Emergency Naval Construction Program authorized by the

laws of the United States, among which were and are the Act of March 26, 1934 (48 Stat. 503, 34 U.S.C.A. 496) and the Act of October 8, 1940 (54 Stat. 1002, 34 U.S.C.A. 496 a) and that said Acts are applicable to VS-14; (2) That Special Provision No. 4 is void and without effect under and by virtue of Section 401 of Title IV of the Second Revenue Act of 1940 (54 Stat. 1003, 34 U.S.C.A. 496 a); (3) That without regard to the effectiveness and validity of the provisions of Special Provision No. 4, the terms and provisions of said Performance Bonds and Endorsement in no event require the Bonding Company to pay as surety any part of such excess profits under Special Provision No. 4 and that it was not the intention of any of the parties to the said Performance Bonds and Endorsement that the Bonding Company should be liable for the faithful performance by Birnie of Special Provision No. 4; (4) That VS-14 and said Prime Contract were and are contracts for the construction and manufacture of complete naval vessels or portions thereof, and were entered into in a taxable year to which the excess profits tax provided in Subchapter E of Chapter 2 of the United States Internal Revenue Code is applicable and would be applicable if Birnie were a corporation; (5) That Birnie and the Bonding Company, or either of them, are not obligated to pay to Permanente, or to the Commission through Permanente, any profits made by Birnie, in excess of 10% of the total contract price, or in any amount; and (6) That Permanente is indebted to Birnie in the sum of \$43,185.27 under VS-14.

36. Said Prime Contract was not negotiated, made, and executed as a part of the Emergency Naval Construction Program authorized by the laws of the United States, among which were and are the Act of March 26, 1934 (48 Stat. 503, 34 U.S.C.A. 496) and the Act of October 8, 1940 (54 Stat. 1003, 34 U.S.C.A. 496 a).

37. Said Prime Contract was not a contract for the construction and manufacture of complete naval vessels or portions thereof.

38. Said VS-14 was not a contract for the construction and manufacture of complete naval vessels or portions thereof.

39. Said Prime Contract was not a contract made with Permanente by the Secretary of the Navy, but was a contract made with Permanente by the Commission acting as an independent agency of the United States, and on its own behalf.

40. Said VS-14 was not a contract made with Birnie by the Secretary of the Navy, and was not a subcontract under a prime contract made with the Secretary of the Navy.

41. Said VS-14 and said Prime Contract were entered into in a taxable year to which the excess profits tax provided in Subchapter E of Chapter 2 of the United States Internal Revenue Code is applicable and would be applicable to Birnie if Birnie were a corporation.

42. Permanente and Birnie also entered into another subcontract under said Prime Contract, said subcontract being designated as Vessels Subcontract No. VS-28, hereinafter called "VS-28." Permanente became indebted to Birnie under said



VS-28 in the sum of \$34,687.59 and refused to pay said amount to Birnie, but instead held said amount as an offset against the amount which Permanente claimed to be due from Birnie under VS-14. Birnie made demand on Permanente for the payment of said sum of \$34,687.59 under VS-28 on or about April 4, 1947.

43. Permanente has agreed to pay to the Commission, as the sole property of the Commission, the net amount of any judgment in this action in favor of Permanente for the repayment of excess profits under Special Provision No. 4 of VS-14, and further to reimburse the Commission for attorneys' fees heretofore paid to Permanente by the Commission in the prosecution of this action to the extent that the judgment in favor of Permanente for attorneys' fees in this action is sufficient to cover such reimbursement.

44. During a period from approximately December 30, 1944, to March 31, 1945, in the Northern District of California, Permanente furnished to Birnie, at the special instance and request of Birnie and in connection with the performance of said VS-14 and VS-28, goods and services of the agreed and reasonable value of \$1,545.66. Permanente demanded payment from Birnie for said sum of \$1,545.66 on or before March 31, 1945, but Birnie has refused to pay any part of said sum to Permanente.

### Conclusions of Law

1. This Court has jurisdiction of the subject of this action and of the parties to this action and should determine their respective rights and render



judgment to give effect to such determination.

2. Special Provision No. 4 of Subcontract VS-14 is valid and binding and is not rendered void or without effect because of Section 401 of Title IV of the Second Revenue Act of 1940 (54 Stat. 1003, 34 U.S.C.A. 496 a). Said Section 401 is inapplicable to Prime Contract No. MCc 15762 and to VS-14 and to said Special Provision No. 4. Likewise the Act of March 26, 1934 (48 Stat. 503, 34 U.S.C.A. 496) is inapplicable to said Prime Contract and to VS-14 and to said Special Provision No. 4. Said Prime Contract was not a contract with the Secretary of the Navy nor was it a contract for the construction or manufacture of any complete naval vessel or any portion thereof within the meaning and effect of said Acts. Said VS-14 was not a contract or subcontract with the Secretary of the Navy nor was it a contract or subcontract for the construction or manufacture of any complete naval vessel or any portion thereof within the meaning and effect of said Acts.

3. Permanente is not obligated to pay Birnie any amount under VS-14.

4. Birnie is obligated to pay to Permanente under VS-14 the sum of \$148,946.57, the amount of the excess profits realized by Birnie under VS-14 as determined by the Commission.

5. Birnie is not obligated to pay Permanente any amount under VS-28.

6. Permanente is obligated to pay to Birnie under VS-28 the sum of \$34,687.59.

7. Birnie is entitled to a credit of said sum of \$34,687.59 against said sum of \$148,946.57, leaving

a net balance due from Birnie to Permanente, after allowing for said credit, of \$114,258.98.

8. Said sum of \$114,258.98 should bear interest at the rate of 7% per annum from March 20, 1947, the date of demand, until paid.

9. Birnie is obligated to pay Permanente an attorneys' fee of \$15,000.00 under Article 29 of VS-14.

10. The effect of said Performance Bonds and Endorsement was to make the Bonding Company liable as surety, among other things, for the faithful performance by Birnie of his obligation to repay to Permanente excess profits as determined by the Commission under Special Provision No. 4. The reference in Special Provision No. 4 to Section 505 (b) of the Merchant Marine Act of 1936 was not intended to have and does not have the effect of exempting the Bonding Company from liability for the repayment of excess profits under Special Provision No. 4.

11. Birnie, as principal, and the Bonding Company, as surety, are jointly and severally liable under said Performance Bonds and Endorsement to pay to Permanente the sum of \$114,258.98 together with interest thereon at the rate of 7% per annum from March 20, 1947, until paid, and also to pay to Permanente said sum of \$15,000.00 for attorneys' fees.

12. Said sum of \$114,258.98 together with interest thereon at the rate of 7% per annum from March 20, 1947, until paid shall, when paid, be paid by Permanente to the Commission as the sole property of the Commission.

13. Permanente shall, upon payment of said

\$15,000.00 award for attorneys' fees, reimburse the Commission for attorneys' fees heretofore paid to Permanente by the Commission for services rendered on behalf of Permanente in the prosecution of this action to the extent that said \$15,000.00 for attorneys' fees is adequate for such purpose.

14. Birnie is obligated to pay to Permanente the sum of \$1,545.66 due for goods and services furnished to Birnie by Permanente.

15. Said sum of \$1,545.66 should bear interest at the rate of 7% per annum from March 31, 1945, the date of demand, until paid.

16. The Motion of the Bonding Company for Judgment on the Pleadings or in the Alternative for Summary Judgment should be denied.

17. The Commission is not obligated to pay Birnie any amount.

18. Permanente should have judgment for its costs of suit against Birnie and the Bonding Company.

19. The Commission should have judgment for its costs of suit against Birnie and the Bonding Company.

Let Judgment be entered accordingly.

Done in Open Court this 20th day of October, 1950.

/s/ DAL M. LEMMON,

United States District Judge.

Receipt of a copy admitted.

[Endorsed]: Filed Oct. 20, 1950.

In the United States District Court for the Northern District of California, Southern Division

No. 26215-L

THE PERMANENTE METALS CORPORATION, a Corporation,

Plaintiff,

vs.

JOHN URQUHART BIRNIE, etc., et al.,

Defendants.

JOHN URQUHART BIRNIE, etc., et al.,

Defendants and Cross-Complainants,

vs.

THE PERMANENTE METALS CORPORATION, a Corporation, et al.,

Plaintiffs and Cross-Defendants.

### JUDGMENT

This case came on to be heard before the above-entitled court, Honorable Dal M. Lemmon, United States District Judge, presiding, February 21st and February 23rd, 1950, and evidence both oral and written was submitted, and the cause was thereafter briefed by counsel for the respective parties, and the Court having heretofore made its findings of fact and conclusions of law herein, and being fully advised in the premises, it is now Ordered, Adjudged and Decreed as follows:

1. That plaintiff, The Permanente Metals Corporation, have and recover from defendants, John Urquhart Birnie and Massachusetts Bonding and Insurance Company, the sum of One Hundred Fourteen Thousand Two Hundred Fifty-eight and 98/100 Dollars (\$114,258.98), together with interest thereon at the rate of seven per cent (7%) per annum from March 20, 1947.

2. That plaintiff, The Permanente Metals Corporation, have and recover from defendants, John Urquhart Birnie and Massachusetts Bonding and Insurance Company, the additional sum of Fifteen Thousand Dollars (\$15,000.00) as attorneys' fees.

3. That plaintiff, The Permanente Metals Corporation, have and recover from defendant, John Urquhart Birnie, the additional sum of One Thousand Five Hundred Forty-five and 66/100 Dollars (\$1,545.66), together with interest thereon at the rate of seven per cent (7%) per annum from March 31, 1945.

4. That plaintiff, The Permanente Metals Corporation, have judgment against defendants, John Urquhart Birnie and Massachusetts Bonding and Insurance Company, for its costs of suit incurred herein in the sum of Five Hundred Forty-four and 73/100 Dollars (\$544.73).

5. That cross-complainants, John Urquhart Birnie and Massachusetts Bonding and Insurance Company, take nothing by their cross-complaint herein against cross-defendants, The Permanente Metals Corporation and United States Maritime Commission.



6. That cross-defendant, United States Maritime Commission have judgement against cross-complainants, John Urquhart Birnie and Massachusetts Bonding and Insurance Company, for its costs of suit incurred herein in the sum of .....  
..... (\$.....).

Done in Open Court this 20th day of October, 1950.

/s/ DAL M. LEMMON,  
United States District Judge.

[Endorsed]: Filed Oct. 20, 1950.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that John Urquhart Birnie, an individual doing business as Birnie Electric Company, and Massachusetts Bonding and Insurance Company, a corporation, and each of them, defendants and cross-complainants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment

entered of record in the above-captioned action on the 23rd day of October, 1950.

HILL, FARRER & BURRILL,  
MELLIN, HANSCOM &  
HURSH,

By /s/ ELLIOTT H. PENTZ,  
Attorneys for Defendant, Cross-Complainant and  
Appellant, John Urquhart Birnie, etc.

CRIDER, RUNKLE & TILSON,

By /s/ CLARENCE B. RUNKLE,  
Attorneys for Defendant, Cross-Complainant and  
Appellant Massachusetts Bonding and Insurance  
Company, a Corporation.

[Endorsed]: Filed Nov. 17, 1950.

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[Title of District Court and Cause.]

### COST BOND ON APPEAL

Whereas, Massachusetts Bonding and Insurance Company, a Corporation, Defendant herein, has prosecuted or is about to prosecute an appeal to the United States Court of Appeals for the Ninth Circuit from a judgment made and entered October 20, 1950, by the District Court of the United States for the Northern District of California, Southern Division.

Now, Therefore, in consideration of the premises, the undersigned, Fidelity and Deposit Company of

Maryland, a corporation duly organized and existing under the laws of the State of Maryland and duly authorized and licensed by the laws of the State of California to do a general surety business in the State of California, does hereby undertake and promise on the part of Massachusetts Bonding and Insurance Company, a corporation, Appellant, that they will prosecute their appeal to effect and answer all costs if they fail to make good their appeal, not exceeding the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, to which amount said Fidelity and Deposit Company of Maryland acknowledges itself justly bound.

And Further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above-entitled matter may, upon notice to the Fidelity and Deposit Company of Maryland, of not less than ten (10) days, proceed summarily in the action of suit in which the same was given to ascertain the amount which said Surety is bound to pay on account of such breach, and render judgment therefor against it and award execution therefor.

Signed, Sealed and Dated this 17th day of November, 1950.

FIDELITY AND DEPOSIT  
COMPANY OF MARYLAND,

[Seal] By /s/ ERBON DELVENTHAL,  
Attorney in Fact.

Attest

/s/ S. CLIMO,  
Attesting Agent.

State of California,  
City and County of San Francisco—ss.

On this 17th day of November, A.D. 1950, before me, Belle Jordan, a Notary Public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared Erbon Delventhal, Attorney-in-Fact, and S. Climo, Agent, of the Fidelity and Deposit Company of Maryland, a corporation known to me to be the persons who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same, and also known to me to be the persons whose names are subscribed to the within instrument as the Attorney-in-Fact and Agent respectively of said corporation, and they, and each of them, acknowledged to me that they subscribed the name of said Fidelity and Deposit Company of Maryland thereto as principal and their own names as Attorney-in-Fact and Agent respectively.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year first above written.

[Seal]      /s/ BELLE JORDAN,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My commission expires Nov. 9, 1952.

[Endorsed]: Filed Nov. 20, 1950.

[Title of District Court and Cause.]

CONCISE STATEMENT OF POINTS ON  
WHICH DEFENDANT, CROSS-COM-  
PLAINANT AND APPELLANT, JOHN  
URQUHART BIRNIE, AN INDIVIDUAL  
DOING BUSINESS AS BIRNIE ELEC-  
TRIC COMPANY, INTENDS TO RELY  
ON APPEAL

Comes Now defendant, cross-complainant and appellant herein John Urquhart Birnie, an individual doing business as Birnie Electric Company, hereinafter called "Birnie," and makes the following concise statement of the points on which he intends to rely upon for appeal to the United States Circuit Court of Appeals from the final judgment made and entered October 23, 1950, in the above-entitled case:

1. The Court erred in finding that Contract MCc 15762, hereinafter called "the Prime Contract," between the cross-defendant United States Maritime Commission, hereinafter called "the Commission," and plaintiff, cross-defendant and appellee, The Permanente Metals Corporation, a corporation, hereinafter called "Permanente," was not negotiated, made and effected as a part of the Emergency Naval Construction Program authorized by the laws of the United States, among which were and are the Act of March 26, 1934 (48 Stat. 503, 34 USCA 496) and the Act of October 8, 1940 (54 Stat. 1003, 34 USCA 496a), in that said finding is contrary to the evidence.



2. The Court erred in finding that the Prime Contract was not a contract for the construction and manufacture of complete naval vessels or portions thereof, in said finding is contrary to the evidence.

3. The Court erred in finding that the subcontract between Permanente and Birnie, being designated as Vessels Subcontract No. VS-14, hereinafter called "VS-14," was not a contract or subcontract for the construction and manufacture of complete naval vessels or portions thereof, in that said finding is contrary to the evidence.

4. The Court erred in finding that the Prime Contract was a contract made by the Commission acting as an independent agency of the United States and on its own behalf, in that said finding is contrary to the evidence.

5. The Court erred in finding that Permanente has done and performed all acts and things required on its part to be done or performed under VS-14 and the addenda thereto, in that said finding is contrary to the evidence.

6. The Court erred in finding that said VS-14 was not a contract made with Birnie by the Secretary of the Navy, in that said finding is contrary to the evidence.

7. The Court erred in concluding as a matter of law that Special Provision No. 4 contained in VS-14, which provision is hereinafter called "Special Provision No. 4," is valid and binding and that said provision was not rendered invalid or void or without effect because of Section 401 of

Title IV of the Second Revenue Act of 1940 (54 Stat. 1003, 34 USCA 496a).

8. The Court erred in concluding as a matter of law that said Section 401 of Title IV of the Second Revenue Act of 1940 is inapplicable to the Prime Contract and to VS-14 and to Special Provision No. 4.

9. The Court erred in concluding as a matter of law that the Act of March 26, 1934 (48 Stat. 503, 34 USCA 496), was not applicable to the Prime Contract and to VS-14 and to Special Provision No. 4.

10. The Court erred in concluding as a matter of law that the Prime Contract was not a contract for the construction or manufacture of any complete naval vessels or any portions thereof within the meaning and effect of the aforesaid acts.

11. The Court erred in concluding as a matter of law that VS-14 was not a contract or subcontract for the construction or manufacture of any complete naval vessel or any portions thereof within the meaning and effect of the aforesaid acts.

12. The Court erred in concluding as a matter of law that Permanente is not obligated to pay Birnie any amount under VS-14.

13. The Court erred in concluding as a matter of law that Birnie is obligated to pay to Permanente under VS-14 the sum of \$148,946.57, or any amount.

14. The Court erred in concluding as a matter of law that Birnie is obligated to pay Permanente attorneys' fees of \$15,000.00, or any amount, under Article 29 of VS-14.

15. The Court erred in concluding as a matter of law that Birnie, as the principal, is severally liable or jointly liable with the defendant, cross-complainant and appellant Massachusetts Bonding and Insurance Company, a corporation, under any performance bonds or endorsements thereto to pay to Permanente the sum of \$114,258.98, or the sum of \$15,000.00 for attorneys' fees, or any sums whatsoever.

16. The Court erred in concluding as a matter of law that Permanente should have judgment for its costs of suit against Birnie.

17. The Court erred in concluding as a matter of law that the Commission should have judgment for its costs of suit against Birnie.

18. The Court erred in not granting the relief as prayed for in the answer of Birnie to the first amended complaint, the cross-complaint and counterclaim of Birnie.

Dated: November 28, 1950.

HILL, FARRER & BURRILL,  
By /s/ ELLIOT H. PENTZ,  
MELLIN, HANSCOM &  
HERSH,

By /s/ OSCAR A. MELLIN,  
Attorneys for Defendant, Cross-Complainant and  
Appellant John Urquhart Birnie, an Individ-  
ual Doing Business as Birnie Electric Com-  
pany.

Receipt of Copy acknowledged.

[Endorsed]: Filed Dec. 4, 1950.

[Title of District Court and Cause.]

CONCISE STATEMENT OF POINTS ON  
WHICH DEFENDANT, CROSS-COM-  
PLAINANT AND APPELLANT, MASSA-  
CHUSETTS BONDING AND INSURANCE  
COMPANY, A CORPORATION, INTENDS  
TO RELY ON APPEAL

Comes Now defendant, cross-complainant and appellant herein, Massachusetts Bonding and Insurance Company, a corporation, hereinafter called "the Bonding Company," and makes the following concise statement of the points on which it intends to rely upon for appeal to the United States Court of Appeals from the final judgment made and entered October 23, 1950, in the above-entitled cause:

1. The Court erred in finding that Contract MCc 15762, hereinafter called "the Prime Contract," between the cross-defendant United States Maritime Commission, hereinafter called "the Commission," and plaintiff, cross-defendant and appellee, The Permanente Metals Corporation, a corporation, hereinafter called "Permanente," was not negotiated, made and effected as a part of the Emergency Naval Construction Program authorized by the laws of the United States, among which were and are the Act of March 26, 1934 (48 Stat. 503, 34 USCA 496), and the Act of October 8, 1940 (54 Stat. 1003, 34 USCA 496a), in that said finding is contrary to the evidence.

2. The Court erred in finding that the Prime



Contract was not a contract for the construction and manufacture of complete naval vessels or portions thereof, in that said finding is contrary to the evidence.

3. The Court erred in finding that the subcontract between Permanente and defendant, cross-complainant and appellant John Urquhart Birnie, an individual doing business as Birnie Electric Company, hereinafter called "Birnie," being designated as Vessels Subcontract No. VS-14, hereinafter called "VS-14," was not a contract or subcontract for the construction and manufacture of complete naval vessels or portions thereof, in that said finding is contrary to the evidence.

4. The Court erred in finding that the Prime Contract was a contract made by the Commission acting as an independent agency of the United States and on its own behalf, in that said finding is contrary to the evidence.

5. The Court erred in finding that Permanente has done and performed all acts and things required on its part to be done or performed under VS-14 and the addenda thereto, in that said finding is contrary to the evidence.

6. The Court erred in finding that said VS-14 was not a contract made with Birnie by the Secretary of the Navy, in that said finding is contrary to the evidence.

7. The Court erred in finding that by the performance bonds and endorsements thereto made, executed and delivered by the Massachusetts Bonding and Insurance Company, hereinafter called the



“Bonding Company,” to Permanente, the Bonding Company, as surety, agreed to be liable for the faithful performance by Birnie of his obligation under Special Provision No. 4 contained in VS-14, which provision is hereinafter called “Special Provision No. 4,” to repay the excess profits as determined by the Commission, or any excess profits, and in finding that under Article 29 of VS-14 the Bonding Company agreed to be liable to pay attorneys’ fees as provided in said Article 29, in that said finding is contrary to the evidence.

8. The Court erred in concluding as a matter of law that Special Provision No. 4 is valid and binding and that said provision was not rendered invalid or void or without effect because of Section 401 of Title IV of the Second Revenue Act of 1940 (54 Stat. 1003, 34 USCA 496a).

9. The Court erred in concluding as a matter of law that said Section 401 of Title IV of the Second Revenue Act of 1940 is inapplicable to the Prime Contract and to VS-14 and to Special Provision No. 4.

10. The Court erred in concluding as a matter of law that the Act of March 26, 1934 (48 Stat. 503, 34 USCA 496) was not applicable to the Prime Contract and to VS-14 and to Special Provision No. 4.

11. The Court erred in concluding as a matter of law that the Prime Contract was not a contract for the construction or manufacture of any complete naval vessels or any portions thereof within the meaning and effect of the aforesaid acts.

12. The Court erred in concluding as a matter of law that VS-14 was not a contract or subcontract for the construction or manufacture of any complete naval vessel or any portions thereof within the meaning and effect of the aforesaid acts.

13. The Court erred in concluding as a matter of law that Permanente is not obligated to pay Birnie any amount under VS-14.

14. The Court erred in concluding as a matter of law that Birnie is obligated to pay to Permanente under VS-14 the sum of \$148,946.57, or any amount.

15. The Court erred in concluding as a matter of law that Birnie is obligated to pay Permanente attorneys' fees of \$15,000.00, or any amount, under Article 29 of VS-14.

16. The Court erred in concluding as a matter of law that the performance bonds and endorsements thereto issued by the Bonding Company, or the effect of said performance bonds and endorsements thereto, made the Bonding Company liable as a surety, or otherwise, for the faithful performance by Birnie of his obligation to repay to Permanente excess profits as determined by the Commission under Special Provision No. 4, or otherwise determined.

17. The Court erred in concluding as a matter of law that the reference in Special Provision No. 4 to Section 505(b) of the Merchant Marine Act of 1936 was not intended to have and does not have the effect of exempting the Bonding Company from liability for the repayment of excess profits under Special Provision No. 4 of VS-14.

18. The Court erred in concluding as a matter of law that Birnie, as principal, and the Bonding Company, as surety, are jointly and severally liable under said performance bonds and endorsements to pay to Permanente the sum of \$114,258.98, together with interest thereon at the rate of seven per cent (7%) per annum from March 20, 1947, until paid, or any sum, or any rate of interest, or to pay to Permanente the sum of \$15,000.00 for attorneys' fees, or any sum whatsoever.

19. The Court erred in concluding as a matter of law that Permanente should have judgment for its costs of suit against the Bonding Company.

20. The Court erred in concluding as a matter of law that the Commission should have judgment for its costs of suit against the Bonding Company.

21. The Court erred in not granting the relief as prayed for in the answer of the Bonding Company to the first amended complaint, the cross-complaint and counterclaim of the Bonding Company.

Dated: November 28, 1950.

CRIDER, RUNKLE & TILSON,

By /s/ CLARENCE B. RUNKLE,

Attorneys for Defendant, Cross-Complainant and Appellant Massachusetts Bonding and Insurance Company, a Corporation.

Receipt of Copy acknowledged.

[Endorsed]: Filed Dec. 4, 1950.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF  
RECORD ON APPEAL

Comes Now John Urquhart Birnie, an individual doing business as Birnie Electric Company, and Massachusetts Bonding and Insurance Company, a corporation, and each of them, and hereby designates the contents of record on appeal as follows:

1. Complaint.
2. Answer to Complaint.
3. First Amended Complaint.
4. Answer to First Amended Complaint, Cross-Complaint and Counterclaim.
5. Answer of plaintiff, The Permanente Metals Corporation, a corporation, to Cross-Complaint and Counterclaim.
6. Answer of cross-defendant, United States Maritime Commission, to Counterclaim and Cross-Complaint.
7. Reporter's transcript of proceedings and testimony taken on February 21, 1950, and February 23, 1950, being pages 1 through 168, inclusive, of said transcript.
8. Plaintiff's and cross-defendants' exhibits A through RR, inclusive.
9. Defendants' and cross-complainants' exhibits 1 through 15, inclusive.



10. Deposition of Ivan Joyce Wanless taken on behalf of plaintiff and cross-defendant, The Permanente Metals Corporation, a corporation, on October 3, 1947, together with all exhibits, other than exhibit HH, to said deposition.

11. Deposition of John Bassette Maher taken on behalf of plaintiff and cross-defendant, The Permanente Metals Corporation, a corporation, on October 1, 1947, together with all exhibits, other than exhibits V, W, X, Y, Z, AA, BB, CC, DD, EE and GG, to said deposition.

12. Deposition of R. L. McDonald, Assistant Secretary of the Maritime Commission, taken on behalf of plaintiff and cross-defendant, The Permanente Metals Corporation, a corporation, on October 1, 1947, together with all exhibits, other than exhibits A, B, C, D, G, K, L, P, S and T to said deposition.

13. Findings of Fact and Conclusions of Law.

14. Final Judgment entered herein on October 23, 1950.

15. Notice of Appeal.

16. Bond on Appeal.

17. Concise statement by defendant, cross-complainant and appellant, John Urquhart Birnie, an individual doing business as Birnie Electric Company, of points on which said defendant, cross-complainant and appellant intends to rely on appeal.

18. Concise statement by defendant, cross-com-



plainant and appellant, Massachusetts Bonding and Insurance Company, a corporation, of points on which said defendant, cross-complainant and appellant intends to rely on appeal.

19. This Designation of Contents of Record on Appeal.

Dated this 28th day of November, 1950.

HILL, FARRER & BURRILL,

By /s/ ELLIOTT H. PENTZ,  
MELLIN, HANSCOM &  
HURSH,

By /s/ OSCAR A. MELLIN,

Attorneys for Defendant, Cross-Complainant and Appellant John Urquhart Birnie, an Individual Doing Business as Birnie Electric Company.

CRIDER, RUNKLE & TILSON,

By /s/ CLARENCE B. RUNKLE,

Attorneys for Defendant, Cross-Complainant and Appellant Massachusetts Bonding and Insurance Company, a Corporation.

Receipt of Copy acknowledged.

[Endorsed]: Filed Dec. 4, 1950.

---

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF  
CONTENTS OF RECORD ON APPEAL

The Permanente Metals Corporation, a corporation, hereby makes its designation of contents of

record on appeal in addition to those items numbered 1 through 19 designated by appellants in their Designation of Contents of Record on Appeal, as follows:

1. Reporter's Transcript of Pre-Trial Conference taken January 4, 1949, pages 1 to 22, inclusive.
2. Appellee's Designation of Contents of Record on Appeal.

Dated: December 14, 1950.

BRUCE WALKUP,  
WILLIS S. SLUSSER,  
THELEN, MARRIN, JOHNSON  
& BRIDGES,

By /s/ BRUCE WALKUP,  
Attorneys for Plaintiff, Cross-Defendant, and Appellee, The Permanente Metals Corporation.

Receipt of Copy acknowledged.

[Endorsed]: Filed Dec. 14, 1950.

In the District Court of the United States for the  
Northern District of California, Southern Division

No. 26215-L

THE PERMANENTE METALS CORPORATION, a Corporation,

Plaintiff,

vs.

JOHN URQUHART BIRNIE, etc., et al.,

Defendants.

JOHN URQUHART BIRNIE, etc., et al.,

Defendants and Cross-Complainants,

vs.

THE PERMANENTE METALS CORPORATION, a Corporation, et al.,

Plaintiffs and Cross-Defendants.

Before: Hon. Dal M. Lemmon,  
Judge.

Appearances:

For Plaintiff and Cross-Defendant Permanente  
Metals Corporation:

BRUCE WALKUP, ESQ.,  
111 Sutter Street,  
San Francisco 4, California.

For Defendants and Cross-Complainants John  
Urquhart Birnie, etc., et al.:

ELLIOTT H. PENTZ, ESQ.,  
HILL, MORGAN & FARRER,  
1007 Title Guarantee Bldg.,  
Los Angeles 13, California.

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395 Sutter Street,  
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For United States Maritime Commission:

C. ELMER COLLETT, ESQ.,  
Assistant United States Attorney.

REPORTER'S TRANSCRIPT OF  
PRE-TRIAL CONFERENCE

Tuesday, January 4, 1949

The Clerk: Permanente Metals Corporation vs.  
Birnie.

Mr. Hursh: May it please the Court, may I introduce Elliott H. Pentz, a lawyer of the Los Angeles Bar, for admission to this Court for the purpose of the trial of this case.

The Court: Very well.

Mr. Walkup: Your Honor, in this matter I represent the plaintiff Permanente Metals Corporation; Mr. Pentz represents the defendant and cross-complainant Birnie Electric Company, and Massachusetts Bonding Indemnity Company; Mr. Collett represents the United States Maritime Commission.

This case has been pending now for a long time and we have made an effort out of court to get together on the admissibility of certain evidence, official documents of the [2\*] Government, correspondence between the parties and so forth, and I believe we have now reached a stipulation that will eliminate a great deal of time at the trial. Mr. Pentz has a stipulation prepared here which is satisfactory to me on that subject, and I do not know whether it is satisfactory to the United States Attorney or not.

Mr. Collett: Is it something that was——

(A document was exhibited to Mr. Collett.)

Mr. Collett: That is agreeable.

Mr. Walkup: Now this particular stipulation, your Honor, refers to the use of copies of documents attached to the depositions on file, waiving objections to the foundation being laid and the fact they are copies and not originals. There are also other documents, such as correspondence between the parties and correspondence between the Maritime Commission and the parties, which we have discussed, and the genuineness is admitted and the use of copies is agreeable on that, isn't it, Mr. Pentz?

Mr. Pentz: Yes, that is true.

The Court: There are no further requests for admissions that counsel have in mind?

Mr. Walkup: Yes, your Honor, I have this point in mind: We have pleaded in our complaint that Permanente has duly and regularly performed all of its obligations under the contract. That is denied in general terms, and I believe we are [3] entitled at the pre-trial conference to have counsel for the

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\* Page numbering appearing at top of page of original Reporter's Transcript of Record.



defendant and cross-complainant specify in what particulars we have not performed.

The Court: I think you are entitled to that.

Mr. Pentz: The same thing applies in reverse, your Honor.

Mr. Walkup: Right.

Mr. Pentz: I can state in our case the extent to which we are very willing to concede on that point, and counsel and I have discussed it informally, we each think along the same line. I am prepared to stipulate that the Permanente Metals Corporation has fully and faithfully performed the terms of the sub-contracts which are the subject matter of this suit with the exception of paying the balance on the sub-contract price that we claim in this litigation. On the other hand I would expect Mr. Walkup to acknowledge that Mr. Birnie, my client, has fully and faithfully performed his obligations under the same sub-contract, everything he was supposed to do with the exception of the two items, one as to paying to the Permanente Metals Corporation as the property of the Maritime Commission certain alleged over-payments of price, which is the nub of their complaint, moneys which are alleged were unlawfully retained as being excess profits. As I say, your Honor, that is the nub of our entire lawsuit.

And the second point I am willing to concede is that Mr. [4] Birnie did not report costs and profits as required by special provision No. 4 of the sub-contract.

I think it is understood between the two of us that each party has done what they are supposed to do

with the exception of Mr. Birnie reporting costs under special provision No. 4.

I have a statement to make about that VS-28. If you have something to add, go ahead.

Mr. Walkup: I am willing to concede on behalf of Permanente Metals Corporation that Mr. Birnie fully performed his obligations under these sub-contracts in question except he failed to return to Permanente for the benefit of the Maritime Commission the excess profits that he made under the contract, and furthermore in that connection that he failed to file with the Maritime Commission his reports under oath as required by the sub-contract setting forth his costs and the profits he realized under the contract.

The Court: That substantially is the same statement as the statement made by opposing counsel.

Mr. Walkup: Yes. In other words, we are willing to admit that Birnie performed with the exception of the obligations as to excess profits.

Mr. Pentz: We admit they did everything except give us the money we are suing for.

The Court: I assume, Mr. Collett, you agree? I assume [5] you are agreeing to these stipulations unless you except to them.

Mr. Collett: As your Honor will recall, there was a motion to dismiss the Maritime Commission that was filed in this matter some time ago, and rather extensive briefs were filed, and I believe as time goes on your Honor will see the point in that case, that the Maritime Commission is not properly a party in that suit and the matter is founded on an alleged contract and involves over ten thousand

dollars and the Court properly does not have jurisdiction. This is a matter between Birnie and Permanente on this sub-contract and should be ironed out between the two of them and the matter submitted to your Honor on that basis. That the Maritime Commission is still in there is a matter that I think that may be properly again presented to your Honor when the case comes to trial in the way of a motion to dismiss as to the Maritime Commission.

Mr. Pentz: Well, the Court, of course, has ruled that at least so far they are necessary parties.

Now I have one more statement to make if you have exhausted that subject. It requires a brief preliminary statement for the Court, I believe, to understand what I am going to state.

There was a prime contract here between Permanente Metals and the Maritime Commission to build a number of vessels. [6] Permanente Metals and my client entered into a subcontract for the installation of certain equipment on a number of those vessels. It is our position that the sub-contracts—rather, it is our position that VS-14, one of the sub-contracts—there are two, VS-14 and VS-28—it is our position that VS-14 qualifies under the Vinson-Trammell Act, and that the undertaking to pay profits in excess of 10 per cent of the stated contract price back is of no effect, that is our contention, that is on the fundamental basis that this was a contract for the manufacture of Navy vessels.

Now when I filed my answer and cross-complaint, since most of the facts were in the possession of the Navy and the Maritime Commission, I didn't know at that time that the vessels covered by VS-28 would

not really qualify as Navy vessels. I did not acquire that information until later in the litigation.

Now I think it is fair to the parties and the Court that I should state that where I sue for the balance of the stated contract price in VS-28, that I wish to acquaint all parties that I abandon any recovery on VS-28 in excess of what the Permanente Metals acknowledge they owe us as an offset on that contract. In other words, in VS-28 they have some \$34,000 which they in their answer to my cross-complaint acknowledge to be due. To the extent of keeping that offset there I naturally will stand on my cross-complaint on VS-28, but I am [7] not seeking any more than they acknowledge to be due on that contract.

Now I will add one more statement—I don't know how much time your Honor wishes to devote to a pre-trial conference, but I will state this, that in regard to the bonding company's claimed liability on VS-14, it is our position that under no conceivable view of this case is there any liability whatsoever, and that fact is a matter of law that is revealed by the pleadings.

If your Honor wishes to hear that matter I would be very happy to make a motion for summary judgment——

The Court: I have a jury trial on at 10:30 and some other matters. Could those legal questions be briefed for the assistance and guidance of the Court in the trial of the case?

Mr. Pentz: Very easily.

Mr. Walkup: Yes, that can be done.



The Court: Getting back to the factual problems, are there any further admissions or requests for stipulations that counsel have in mind?

Mr. Walkup: No, your Honor, I think not; but under—there is another matter that we might take up at this pretrial conference. Under Rule 16, subdivision 2, of the Federal Rules of Civil Procedure, the Court at the pre-trial conference can allow amendments of the pleadings, and I would [8] like to amend the pleadings on their face, if the Court please, in two particulars. The first has merely to do with a correction of a mathematical computation which appears on page 6, line 3, of the answer of Permanente to the cross-complaint. At that place I would like to substitute \$34,687.59 for the figure which appears there of \$35,065.63. That is a correction in a mathematical computation which was recently discovered.

The Court: No objection to that?

Mr. Pentz: None, because I have one to ask for.

Mr. Walkup: And the same substitution should appear on line 4, page 6, of the answer of Permanente to the counter-claim and cross-complaint.

The Court: Same substitution of figures?

Mr. Walkup: Yes. It is just on the following line.

Now the next amendment I would request the Court to approve would be to amend the title to the complaint. I believe the title is merely surplussage any way, but I designated the complaint as a complaint for damages for breach of contract. Actually what it is is a complaint for payment of money.



I don't want to be bound by the designation of the complaint as a complaint for damages of breach of contract when actually, as the prayer indicates, we are merely asking for the payment of certain money rather than damages, and I ask that the title of the first amended complaint be amended to read, [9] "First Amended Complaint for Payment of Money Due, and against the Principal and Surety Upon Contract Performance Bond."

The Court: I see no objection to that.

Mr. Pentz: None.

Mr. Walkup: Now the third amendment which I would like to request would be that on the second cause of action the United States Maritime Commission, which is already before the Court, be joined as a party defendant. That cause of action is a complaint by Permanente Metals Corporation against Birnie Electric Company and the Massachusetts Bonding & Indemnity Company on the performance bond which the indemnity company gave to guarantee performance by Birnie on the subcontracts.

Now those bonds run in favor of Permanente Metals Corporation and the Maritime Commission Metals Corporation and the Maritime Commission as their interests may appear. The Maritime Commission was not joined as one of the parties sued on that for two reasons: first we felt that the Court did not have jurisdiction over the Maritime Commission; secondly, we felt that from the contracts that the obligation of Birnie was to pay to Permanente and not the Maritime Commission. The contract so states.

However, objection has been raised by the defendants; so that their interests may be fully adjudicated they would like the bonding company and the Government both before the Court so that their obligation to pay would be fully determined. [10]

Now since the Government in the Maritime Commission is already before the Court, I can see no objection to us at this time joining them as a defendant to the cause of action on the performance bonds.

I understand from Mr. Collett that is agreeable to him subject to the basic objection that the Maritime Commission should not be here at all.

The Court: Well, the permission is granted to amend in that particular without prejudice to your right to raise this same point by motion or otherwise at the trial of the case.

Mr. Walkup: Now would it be the wish of the Court that I file an amended pleading or merely file an amendment to that cause of action joining the Government.

The Court: You may merely file an amendment.

Mr. Walkup: Now there is one other point on the admission of documents which I have already discussed with Mr. Pentz. I have certified by the Maritime Commission a number of delivery certificates for vessels which were delivered. The Maritime Commission in Washington is unable to locate one of the delivery receipts. That accounts for the fact that one of them is not certified. However, to avoid the necessity of bringing witnesses here, Mr. Pentz has agreed that this certificate for Hull No.

527 can be included in the number of [11] certificates which are certified by the Commission. Is that agreeable?

Mr. Pentz: That is agreeable.

The Court: You had better identify it.

Mr. Walkup: Certificate of delivery of vessel, Hull No. 527, your Honor. It covers delivery from Permanente Metals to the Maritime Commission only as do all the other delivery certificates.

I believe that Mr. Pentz's statement and what transpired here this morning covers all the other points I had in mind, and the motion for production of documents which is also on the calendar has been satisfied by the delivery of the documents by Mr. Pentz out of court.

Mr. Pentz: I would ask for permission to amend my answer and cross-complaint to correct some arithmetic errors.

On page 6, line 26, should appear the figures \$432,604.83 rather than \$432,688.50.

On line 30 of the same page the figures should appear \$43,185.27 rather than \$43,268.94.

On page 15, line 16, is the same change, namely, \$432,604.83 in lieu of \$432,688.50.

And on line 11 on page 15 the figures should be \$43,185.27 in lieu of \$43,268.94. The same latter change to be carried through on line 20 of page 15; the figures should be \$43,185.27 in lieu of \$43,268.94, and the identical change [12] that I have last mentioned to be made on line 20 should also be made on line 23 of page 15.

On page 17—I will withdraw that remark.

Your Honor, I want it understood in my cause of action on this VS-28 I am not going to try to prove a case on that beyond what they acknowledge to be due, so I don't believe it is necessary for me to go ahead and make those changes, since it is understood.

Mr. Walkup: It can be made at the time of the trial so far as that is concerned.

The Court: Well, as long as counsel understand each other, why not make these changes in the pleadings?

Mr. Pentz: That is agreeable.

Mr. Walkup: That is entirely agreeable with us.

Mr. Pentz: The only remaining thing I can comment on is the attitude of the Court in regard to a matter of procedure. I intend to make a motion for a summary judgment in so far as the Massachusetts Bonding Company. I can make the motion now, it is rather brief, or if the Court——

The Court: I am going to ask counsel submit a memorandum on the legal problems that will arise in the trial of the case, and you might submit that in the same memorandum.

Mr. Pentz: Should I make a formal motion?

The Court: It would be well to do that, and include that in your memorandums, and in so far as counsel are agreeable [13] on the facts, they can be contained in those memorandums, I take it.

Mr. Pentz: Our difficulty is, we are in agreement on the basic documents and the letters and the memoranda, all of which we are ready to introduce subject to certain objections, but when we go much further we are agreeing on legal conclusions, which is rather



difficult. There will be many questions on the admissibility of these documents. There is no contention that they do not exist or they are not genuine, but there will be a serious contention they are not relevant.

The Court: You can discuss those in the memorandums you file in so far as you can foresee them.

Mr. Pentz: There is such a great multitude of them I am afraid we might tend toward confusion.

The Court: Can't they be grouped, separate into groups?

Mr. Walkup: Your Honor, maybe a brief explanation from me may clarify the point. Birnie contends that these excess profits limitations in the contracts are invalid because of the Vinson-Trammell Act, which is in the United States Code. It is a limitation upon excess profits provisions in contracts made with the Secretary of the Navy for the construction of Naval vessels, or portions thereof.

Now our contention is that the contracts were not with the Secretary of Navy but were with the United States Maritime Commission and that the Vinson-Trammell has absolutely no [14] application to contracts of this kind. If these were contracts which Mr. Birnie entered into with the Secretary of the Navy for construction of or outfitting of a vessel in a Navy yard, as many contractors do, we would not be permitted to include in the contract the limitations on excess profits. However, these particular contracts were entered into under public laws relating to the Maritime Commission. The prime contract was between Permanente and the Maritime



Commission, and the subcontract was between Birnie and Permanente, but under the Maritime Commission setup was not a sub-contract which would come under the Vinson-Trammell Act.

Now that is our complete position, and we feel as a matter of law without any evidence, just from reading the documents and studying the statutes, the Court should conclude that this is not within the scope of the Vinson-Trammell Act.

Now Birnie's position, as I understand, is, at least in part, that these vessels which were constructed had certain Naval features in them; that they were basically Maritime Commission Victory ships which were converted and had guns put on them and other features of a Naval nature, and after Permanente delivered them to the Maritime Commission the Maritime Commission turned them over to the Navy and the Navy did use them as transports.

We concede the facts as will appear from documents and [15] from the evidence that after Permanente concluded its contract and delivered them to the Maritime Commission the Maritime Commission entered into certain arrangements with the Navy whereby the Maritime Commission transferred these vessels, on a basis which will appear, to the Navy for use in the war effort and later to be returned to the Maritime Commission, but we contend that would not make them Navy vessels within the meaning of the statute which embodies the Vinson-Trammell Act, that that still would not make them vessels

constructed for the Secretary of Navy under contract with him.

The Court: Can you agree upon the facts so that you can present a question of law upon that feature of the case?

Mr. Walkup: I believe that we can.

The Court: And if I rule on that prior to the trial of the case that will simplify the problem as to the documents.

Mr. Pentz: I would suggest that since it is our position that this voluminous correspondence between the Navy and the Maritime Commission was such as to constitute the Maritime Commission in effect as agent for the Navy, in accordance with the statutory authority that the Maritime Commission can be such an agent, that whatever the Maritime Commission did in regard to these twenty-two vessels under VS-14 it was doing on behalf of the Secretary of Navy just as much as though the Secretary of the Navy had signed the contract, and I think perhaps Mr. Walkup and I, since the letters and memoranda between [16] the two agencies are so vital, that probably what we should do is to perhaps group them—we acknowledge they are genuine, we acknowledge they exist, and the copies are here, but I think perhaps we should get together and group them into groups and put them in logical sequence, which they are not in in the deposition, from which your Honor by reading them could get a chronological story of the course of events and make them simple, because that will be the nub of the case as far as the Birnie Company.

So far as the bonding company, I don't think under any conceivable ground they are liable.

I think if we could group that correspondence in some logical sequence that we would be of assistance to the Court.

Mr. Walkup: I am just wondering, your Honor, if maybe the logical way of doing this would not be for Permanente Metals to make a statement of its position, then have that answered by the defendants, let them state their position, and then give Permanente a chance to answer that, because if we write briefs which are filed coincidentally we won't be able to do that.

The Court: Well, I think that is what should be done.

Mr. Walkup: How much time?

Mr. Pentz: Is it counsel's suggestion this be simply a statement of position?

The Court: I want you to go further than that, I want you [17] to state not only your position, but the legal basis for that position, and in the reference to that state your position and the background of it.

Mr. Pentz: May I ask the Court what we could do with regard to the presentation to your Honor of this copious correspondence?

The Court: I think possibly you should file the first memorandum setting forth what your suggestions are in the way of grouping the documents, as you say, chronologically as they fall into groups, and then if you will please develop the position you take on the law standpoint, and then that can be answered by Permanente and you can reply.

Mr. Pentz: Fine.

The Court: If I need anything further from counsel I will call upon you.

Mr. Pentz: May we give our version—for example, we have letter so and so; this would seem to be of help to the Court, if we sort of paraphrased its contents.

The Court: Yes, I think so. How much time would you want to do this?

Mr. Pentz: Am I to present the first memorandum, your Honor?

The Court: Yes.

Mr. Pentz: Well, I would like to have three weeks.

The Court: Three weeks? [18]

Mr. Pentz: Three weeks.

The Court: Very well. Three weeks for you.

Mr. Walkup: That is satisfactory.

The Court: And how long to reply, two weeks?

Mr. Pentz: That will be satisfactory.

The Court: And then after those have been filed and I consider them, then I can put it on the calendar for setting. I don't want to set it now because it will go so far in the future. I know you gentlemen want some definite date, and after I rule on those matters I think probably we can set it, say, four weeks in advance for a date that is acceptable to counsel.

Mr. Walkup: I think by the time we have filed these briefs and your Honor has considered them, that the trial will probably not last more than a half day or a day at the most.



Mr. Pentz: Well, a half day is pretty short, but I think one day or two.

Mr. Collett: Your Honor, on behalf of Maritime Commission, which is still in there, we will endeavor to reply within the time that the Permanente Metals replies.

The Court: Very well.

Mr. Pentz: Shall we file this stipulation at this time, your Honor.

(Thereupon the Court took up some other matters.) [19]

(The following proceedings were had in chambers.)

The Court: This is a stipulation in the Permanente Metals vs. Birnie case. Now you may state it.

Mr. Walkup: In the second cause of action in the first amended complaint Permanente sues Birnie Electric Company and the Massachusetts Indemnity Company on the performance bonds, and Mr. Pentz has raised the question as to what would happen as to any moneys which Permanente received either from Mr. Birnie or the bonding company; that is, whether Permanente would keep that money or whether Permanente is obligated to pay that over to the Maritime Commission, and I have agreed to stipulate that any money that Permanente may recover in this action against either Birnie or the bonding company Permanente is bound by contract to pay and will pay to the United States Maritime Commission as the sole property of the Maritime Commission, subject to any existing offsetting credits between Permanente and the Maritime Com-



mission. That relates to the principal sum for excess profits.

We have also asked in our complaint for an award for attorney's fees if Permanente prevails in the case. That is covered under one general provision of the contract.

Now as to attorney's fees, I believe that that would also go to the Government to reimburse the Government for attorney's fees previously paid, but I don't know the extent of what attorney's fees have been paid by the Maritime Commission through [20] Permanente to us as counsel, but to the extent at least that the Government has already paid through Permanente as attorney's fees to us, the Government would be entitled to be repaid any attorney's fees if the Court so awards, but as to the entire principal sum that Permanente might recover would be in turn paid or credited by it to the Maritime Commission.

Does that cover that, Mr. Pentz?

Mr. Pentz: Yes, with one correction I would like to make; not an implication, Mr. Walkup, but I believe it was you that raised the question as to whom any recoverable money from the bonding company should go, because I am hard put to see how the bonding company is going to be liable any way, but rather than to go through the mechanics of getting the commission in as a party, as Mr. Walkup requested in open court, it was agreeable with me that there be no objection made to their absence as a party to the second cause of action upon condition that Mr. Walkup would stipulate

to what he has just read, which was that any money that Permanente may recover in this action against Birnie or the bonding company, that Permanente is bound by contract to pay and will pay to the Maritime Commission as the sole property of the Maritime Commission, subject to any existing Maritime Commission off-setting credits.

Mr. Walkup: That is agreeable. Then that will avoid, your Honor, the necessity of Permanente bringing in the [21] Maritime Commission as a party on the second cause of action in the first amended complaint, and no objection will be made to its absence.

Mr. Pentz: That is correct.

Mr. Collett: And I believe that probably obviates the necessity of having the Maritime Commission in there at all as far as your point of view is concerned.

Mr. Pentz: That is not true, because if the Maritime Commission is out of this litigation as a party we would argue strenuously that any damages had would be nominal, at the most one dollar. Now if you wish to get out that is your privilege, but we will certainly press that point. As a matter of fact, we resisted your motion to get out because of the fact that we did want—we would have that point at the time of the trial, and if we sat here and not objected to your motion to get out of the case, then when we came to trial we would probably be estopped from raising the point that their absence would affect damages.

The Court: That covers it, doesn't it?

Mr. Pentz: Yes, your Honor.

Mr. Walkup: Yes, your Honor.

The Court: All right. [22]

Certificate of Reporter

I, Clarence F. Wright, Official Reporter, certify that the foregoing 23 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ CLARENCE F. WRIGHT.

[Endorsed]: Filed Mar. 16, 1949.

In the District Court of the United States for the  
Southern Division of California, Northern Dis-  
trict

No. 26215-S.L.

THE PERMANENTE METALS CORPORA-  
TION, a Corporation,

Plaintiff,

vs.

JOHN URQUHART BIRNIE, an Individual  
Doing Business as BIRNIE ELECTRIC  
COMPANY; MASSACHUSETTS BONDING  
AND INSURANCE COMPANY, a Corpora-  
tion, et al.,

Defendants.

JOHN URQUHART BIRNIE, an Individual  
Doing Business as BIRNIE ELECTRIC  
COMPANY, and MASSACHUSETTS BOND-  
ING AND INSURANCE COMPANY, a Cor-  
poration,

Defendants and Cross-Complainants,

vs.

THE PERMANENTE METALS CORPORA-  
TION, a Corporation; UNITED STATES  
MARITIME COMMISSION, and JOSEPH K.  
CARSON, RAYMOND S. McKEOUGH,  
ADMIRAL WILLIAM W. SMITH, GRAN-  
VILLE MELLON and RICHARD PARK-  
HURST, as Members of United States Maritime  
Commission,

Plaintiff and Cross-Defendants.

Before: Hon. Dal M. Lemmon, Judge.

Appearances:

For Plaintiff and Cross-Defendant, The Permanente Metals Corporation, a Corporation:

BRUCE WALKUP, ESQ.,  
111 Sutter Street,  
San Francisco, Calif.

For United States Maritime Commission:

C. ELMER COLLETT, ESQ.,  
Asst. U. S. Attorney,  
Post Office Building,  
San Francisco, Calif.

For Defendants and Cross-Complainants:

ELLIOTT PENTZ, ESQ.,  
411 West Fifth Street,  
Los Angeles, Calif. and

OSCAR A. MELLIN, ESQ.,  
391 Sutter Street,  
San Francisco, Calif.

## REPORTER'S TRANSCRIPT

Tuesday, February 21, 1950, 2:00 P.M.

The Clerk: Number 26215, Permanente Metals vs. Birnie, for trial, motion for judgment on pleadings.

Mr. Walkup: Ready, your Honor.

Mr. Pentz: Ready, your Honor.



The Court: Are there any suggestions that counsel can make in the way of stipulations and requests for admissions that might boil these issues down?

Mr. Pentz: None that I know of, your Honor.

Mr. Walkup: Your Honor, I have prepared for the convenience of the Court, and have served counsel with the trial memorandum as to contested issues which are raised by the First Amended Complaint.

This case has been pending a long while and there have been certain stipulations entered into. There has been a pretrial conference, and there was at least one stipulation entered into during a deposition. So that it now appears that most of the issues of the first amended complaint are admitted in one form or another, and I have, for the convenience of the Court, taken each paragraph of the First Amended Complaint and stated what is admitted by the answer or admitted by a stipulation at the pretrial conference, or in some other manner so as to narrow the matter down to the few remaining disputed issues.

The Court: Can you tell me what those remaining issues [4\*] are?

Mr. Walkup: I believe I can, your Honor, as far as the first amended complaint goes. The first paragraph is denied that Permanente Metals Corporation is a Delaware Corporation.

Mr. Pentz: Oh, yes, we will admit that at this time, your Honor.

Mr. Walkup: Your Honor might desire to follow the memorandum which I have prepared.

The second paragraph is partially admitted, but it

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\* Page numbering appearing at top of page of original Reporter's Transcript of Record.

is denied that Mr. Birnie was doing business in the Northern District of California at the time the complaint was filed.

I have no way of proving that one way or the other, and I don't think it is material. The Court has jurisdiction in any event, so I think that is now immaterial.

The third paragraph is admitted.

The fourth paragraph—there is a denial on information and belief as to the status of the fictitious defendants. I now move the Court to dismiss the complaint as to all of the fictitious defendants.

The Court: That motion is granted.

Mr. Walkup: Paragraphs 5 through 9 are admitted.

Paragraph 10, although originally denied in the pleadings, was admitted at the pre-trial conference to this extent: It was admitted that Permanente has fully and faithfully done and performed all acts and things required to be done and performed by it under contract VS-14, except that Permanente [5] has not paid the balance of the contract price required by Birnie to be paid——

The Court: That goes right to the essence of this——

Mr. Walkup: That is correct. ——but as far as performance by Birnie, there is now an admission that it has been performed.

Paragraph 11, it is admitted that Contract VS-14 contained the special provision number 4, which is the special provision in controversy, but it is denied that the legal effect of that provision is as we plead it.

The Court: Now you may proceed.

Mr. Walkup: It is further admitted under Paragraph 11 that Birnie did not make report under oath to the Maritime Commission in care of Permanente upon the completion of contract VS-14 as required by special provision number 4. That was admitted in two manners—by failure to deny a request for admission which was made by Permanente, and also admitted by the pre-trial conference as shown in the transcript of the pre-trial conference.

I might state on that point, your Honor, that subdivision 4 of this contract VS-14 required at the end of the work Mr. Birnie file a report under oath to the Maritime Commission setting forth certain information upon which a determination of excess profits could be based.

That is material in view of the regulations of the [6] Commission for the determination of excess profits which provide that in the event of failure of an individual to file such reports a determination can be made, and I will introduce those regulations in evidence, but that is the importance of that particular feature of the case.

Paragraph 12 is denied as to the first paragraph, which has to do with the making by the Commission of the determination of profits, subject to recapture. However, it is admitted that after the Commission notified Birnie that it had made such a determination, Birnie did not thereafter, within thirty days from the date of receipt of the letter, request a hearing before the Commission with respect to the

determination as to the excess profits. The Commission's notice to Mr. Birnie, which is referred to, stated that a determination had been made and that he had thirty days to demand a hearing, if dissatisfied.

He has denied that the determination was properly made, or that the Commission had authority to make the determination, but he has admitted that he was notified of the determination and failed to request a hearing within the thirty days allowed.

Under Paragraph 13 it is admitted that Permanente paid Birnie the total sum of \$389,419.56, but it is denied that that was a payment in excess of the amount due.

Under Paragraph 14 it is admitted a demand for payment has been made by Permanente, and that Birnie has refused to [7] make the payment, but denied that any balance is owing.

Now, I believe, your Honor, that the evidence which I desire to introduce under that first cause of action either is all covered by stipulation or can be very briefly.

I propose to offer in evidence certain contracts, certain cancelled checks showing payments, showing the date of payments and other matters which I believe can be introduced in about fifteen minutes in a very orderly fashion by stipulation of counsel.

Speaking first as to the first cause of action, the first exhibit which I propose to offer is the prime contract between the United States Maritime Commission and Permanente Metals Corporation dated April 22, 1943. It is contract number MCo-15762. By the request for admission, it has already been



stated that this is a true and correct copy of the contract.

The Court: Any objection to this?

Mr. Pentz: No objection whatsoever, your Honor.

The Court: It will be received, then, as the Plaintiff's first in order.

The Clerk: Plaintiff's Exhibit 1.

Mr. Mellin: If your Honor please, there are already letters on the Plaintiff's Exhibits in the deposition. The numbers are on the defendants' exhibits. May they keep that order?

The Court: Very well. [8]

Mr. Walkup: This will be A, then.

(The document referred to was marked Plaintiff's Exhibit A.)

Mr. Walkup: The next exhibit I propose to offer, your Honor, is Addendum Number 1 of the contract introduced as Exhibit A, a photostatic copy likewise.

Mr. Pentz: No objection, your Honor.

The Court: What number did it take in the deposition?

Mr. Walkup: These were not introduced in the deposition, your Honor.

Mr. Pentz: They were in the request for admissions. That happens to be Exhibit E in our first request for admissions.

Mr. Walkup: I think it would probably be more orderly to start off with A, B, and C, then we can relate back to the deposition numbers elsewhere.

The Court: I suppose as to Exhibit Number B



referred to in the deposition, your suggestion for an orderly introduction of these would be interfered with if this came in as Plaintiff's Exhibit B?

Mr. Pentz: I have no objection to the order actually, I am not trying to make any objection to it, but that would be true, that would not correspond precisely to the designation in the deposition.

Mr. Walkup: Whatever the Court desires. [9]

The Court: I think counsel might agree what numbers they want to give to these. You gentlemen have gone into this far deeper than I have.

Mr. Mellin: If your Honor please, could it go in as Exhibit B, and let the record show it is Exhibit E in the deposition?

The Court: Yes.

(The document referred to was marked Plaintiff's Exhibit B.)

Mr. Walkup: The next exhibit I propose to offer, your Honor, is Addendum Number 2 to the same contract. It is also a photostatic copy of the original.

Mr. Mellin: May the record also show that is Exhibit E in the request for admissions, your Honor?

The Court: Yes.

(The document referred to was marked Plaintiff's Exhibit C.)

Mr. Walkup: The next exhibit that I propose to offer, your Honor, is Addendum Number 3 to the same contract, a photostatic copy likewise, Addendum 3 to the same contract.

(The document referred to was marked Plaintiff's Exhibit D.)

Mr. Pentz: May the record show that Plaintiff's

D is found in Mr. Walkup's answer to our request for admissions as an exhibit thereto? [10]

The Court: Yes.

Mr. Walkup: The next exhibit that I propose to offer, your Honor, is Addendum Number 4 to the same contract. This was also referred to in Permanente's answer to request for admissions by Birnie.

(The document referred to was marked Plaintiff's Exhibit E.)

Mr. Walkup: The next exhibit that I propose to offer, your Honor, is a prime contract between United States Maritime Commission and Permanente Metals Corporation, dated April 1st, 1945, and designated as contract number MCo-36452.

I would like to state in this connection that the reason for introducing this is that it is referred to in Addendum 3 to the previous contract, and this contract takes over certain of the functions which originally were in issue under the previous contract, so that in order to have the complete picture it is necessary to have this contract, together with the contract introduced as Plaintiff's Exhibit A.

Mr. Pentz: That is correct.

(The document referred to was marked Plaintiff's Exhibit F.)

The Court: I will interrupt at this point.

(The Court thereupon took up another matter.)

The Court: Now, you may proceed.

Mr. Walkup: The next exhibit I propose to offer,

your [11] Honor, is Addendum Number 1 to Contract MCc-36452, the contract which was just introduced.

(The document referred to was marked Plaintiff's Exhibit G.)

Mr. Walkup: The next contract which I propose to introduce, your Honor, I am not certain that Counsel is familiar with, it is contract number MCc-41503, and it is referred to in Addendum Number 4 to Exhibit A, and it is also referred to in Addendum 1 to Contract MCc-36452.

I will state that the purpose for introducing this contract is to demonstrate that any money which is collected by Permanente Metals in this case must be paid by Permanente Metals to the United States Maritime Commission.

Mr. Pentz: We have already stipulated to that, haven't we, Mr. Walkup?

Mr. Walkup: We have so stipulated, and this contract which is referred to in the exhibits previously introduced expresses that in contract form.

Mr. Pentz: If that is the purpose—I have never seen the contract and I don't know what it states, but I have no objection, if it is limited to that purpose, because I have already stipulated to that.

Mr. Walkup: That is the purpose.

The Court: What is to be gained by fortifying the stipulation? [12]

Mr. Walkup: I am not certain if there is anything to be gained, your Honor. The issue has been raised in argument in this case that Permanente will not be damaged if it does not collect this money from

Birnie. Now, this contract requires us to pay the money over to——

The Court: Yes, so stipulated by opposing counsel.

Mr. Walkup: I think this contract would assist in establishing the fact that we have an obligation to pay that, and, therefore, we would be hurt if we were not entitled to receive the money. However, if the stipulation covers that point, I have no desire to clutter up the record.

Mr. Pentz: Well, I precisely so stipulated, and I am quite sure, I can assure Mr. Walkup, that we are not going to advance the type of claim he seems to be concerned about.

Mr. Walkup: With that stipulation, then, I withdraw my offer of Contract Number MCc-41513.

The next document which I propose to offer is the original of the Vessels Sub-Contract Number VS-14. This is referred to in the pleadings, and the copy in the pleadings is admitted to be a true copy, but I think it might be agreeable to the Court to have the actual original contract in evidence.

Mr. Pentz: No objection.

(The document referred to was marked Plaintiff's Exhibit H.)

Mr. Walkup: I offer as the next exhibit in order [13] Addendum Number 1 to Sub-Contract Number VS-14, which is also the original Addendum Number 1 to the Sub-Contract.

(The document referred to was marked Plaintiff's Exhibit I.)

Mr. Walkup: I next offer the original Addendum Number 2 to Sub-Contract Number VS-14.

(The document referred to was marked Plaintiff's Exhibit J.)

Mr. Walkup: I next offer the original Addendum Number 3 to Sub-Contract Number VS-14.

(The document referred to was marked Plaintiff's Exhibit K.)

Mr. Walkup: Now, with reference to Paragraph 12 of the First Amended Complaint, I offer at this time a certified copy of Resolution of United States Maritime Commission at a meeting held February 25, 1947, which is the determination by the Commission of the excess profits subject to recapture under Sub-Contract VS-14.

Mr. Pentz: We have already stipulated to that, haven't we, Mr. Walkup? I have a copy in my file and it has been stipulated to as to the determination of the profits.

Mr. Walkup: In other words, I am——

Mr. Pentz: If I am incorrect in that, I would like to be advised, but I have a copy of the stipulation before me.

Mr. Walkup: We had a stipulation a long time ago which [14] is not executed——

Mr. Pentz: I am willing to execute it now. There is nothing here I am not willing to stipulate to. I don't know why it wasn't signed.

Mr. Walkup: At any event, I have here a certified copy which I will offer in evidence as Plaintiff's Exhibit next in order.



(The document referred to was marked Plaintiff's Exhibit L.)

Mr. Walkup: And, further, in connection with Paragraph 12 of the First Amended Complaint, I offer in evidence a certified copy of the regulations of the United States Maritime Commission, prescribing method of determining profit. This is referred to in Sub-Contract VS-14.

Mr. Pentz: Just a second. No objection.

(The document referred to was marked Plaintiff's Exhibit M.)

Mr. Mellin: If your Honor please, at this time I would like to ask counsel, through the Court, whether or not it is not determined between the parties or it can be stipulated the precise amount involved so that we might eliminate a lot of time——

The Court: I was going to bring that up.

Mr. Walkup: Yes, your Honor. I am quite sure we can.

Mr. Mellin: Then we could eliminate, perhaps, some of [15] this record, because I am certain there is no issue as to the amount.

Mr. Walkup: I agree, your Honor, and I have notes of those amounts which I can cover in just a moment. I have about two more exhibits to offer. I next offer, your Honor, a certified copy of a letter from the Maritime Commission to Birnie Electric Company, dated March 3, 1947. That is included under one certification with another letter of March 27, 1947, but I only offer the first letter, that is the letter of March 3, 1947, at this time.

Mr. Pentz: No objection.

(The document referred to was marked Plaintiff's Exhibit N.)

Mr. Walkup: Now, at this time, your Honor, I have proposed to offer the cancelled checks from Permanente Metals Corporation to Birnie Electric Company totaling \$389,419.56. However, that total amount is admitted having been paid in the pleadings, and my only purpose in offering the checks is to show the dates of payment, and possibly we can stipulate the dates appearing on the checks as the dates of payment. The total amount paid is admitted.

Mr. Mellin: It would seem to me it would be wholly immaterial, your Honor.

Mr. Walkup: It wouldn't be immaterial on the question of interest running on the amount. We made a demand for payment subsequently, but I want to show before we made the [16] demand for payment the money was paid to Birnie and we have demanded back a portion at a later date.

Mr. Birnie: Your Honor, the question of \$389,000 pleaded in the pleadings or the time of the payment of the various amounts is completely immaterial. The date of interest would run——

The Court: From the demand for repayment.

Mr. Mellin: From the demand for repayment and the determination of the Maritime Commission, and that would not be fixed by the checks, it would be fixed by the resolution. The dates on the checks would be immaterial.

Mr. Walkup: I will accept the stipulation this money was paid before the demand for payment.

Mr. Mellin: There is no question about that.

The Court: That is the only matter of proof?

Mr. Walkup: That is the only point I had, your Honor.

Now, as to the demand for repayment, I offer in evidence at this time a copy of a letter dated March 20, 1947, addressed to John Urquhart Birnie, doing business as Birnie Electric Company, and Massachusetts Bonding and Insurance Company, from Thelen, Marrin, Johnson and Bridges. I believe we had a stipulation in Mr. Birnie's deposition that this copy could be used in lieu of the original.

Mr. Pentz: That is correct.

(The document referred to was marked Plaintiff's Exhibit O.) [17]

Mr. Walkup: Now, as to the amount, your Honor, the present amount that Permanente is suing for in the first amended complaint under the first cause of action, that is \$148,946.57. The same amount is demanded against the bonding company under the second cause of action, and under the third cause of action there is a demand against Birnie alone for \$1,545.66.

Permanente admits that it owes to Birnie under a separate contract and is holding as an offset the sum of \$34,687.59.

Will you gentlemen correct me if I am wrong on the figures?

Mr. Pentz: Just a moment. We will accept it subject to a check at a later time. That sounds right.

Mr. Walkup: Now, Birnie has cross-complained

against Permanente and the Maritime Commission, and the amount now sought is \$43,185.27 under Contract VS-14. Birnie also claims \$34,687.59 under the other contract, VS-28. That is the same \$34,687.59 which we admit we are holding as an offset.

Now, as to the small item of \$1,545.66, it is admitted——

The Court: Is there something you want to take up in this case?

(The Court thereupon took up another matter.)

Mr. Walkup: I was stating, your Honor, that as to the amount of \$1,545.66, which is the amount prayed for in the third cause of action and not related to contract, but merely [18] for goods and services rendered, it is admitted by Birnie that he received the goods and services in that amount.

Mr. Pentz: That is correct.

Mr. Walkup: Now, subject to checking those figures again tonight, your Honor, I believe that they are the correct figures of the amount now in dispute.

Mr. Pentz: Yes, I believe that is correct, Mr. Walkup.

Just to make it clear, we are abandoning any affirmative steps under this other sub-contract VS-28 except to the extent that there is a set-off owed us, and our issues, then, have to do only with VS-14.

Mr. Walkup: Yes. There was originally a claim of \$113,377.79, by Birnie against Permanente and the United States Maritime Commission under VS-28.

Mr. Pentz: Yes. The abandonment just now mentioned was fully contained in our pre-trial conference. It was abandoned at that time.

Mr. Walkup: Now, under the second cause of action, your Honor, there is an incorporation by reference of Paragraphs 1 to 14 of the first cause of action, following which there are Paragraphs 2, 3, 4, and 5 which set forth that certain performance bonds, and I have the original performance bonds, which I desire to offer in evidence under the Second Cause of Action.

Mr. Pentz: At this time, your Honor, I feel it is timely, [19] so as to keep our record from becoming over-voluminous, that my motion for judgment so far as the bonding company on the pleadings or in the alternative for summary judgment might be heard at this time, because I believe that as a bare matter of law there can be no conceivable liability against the bonding company. Perhaps this is an opportune time to hear that motion, rather than to get these bonds in the record.

The Court: Well, can't you make a motion that all of the issues be considered at the end of the case?

Mr. Pentz: Well, I can only answer that this way, that insofar as Mr. Birnie is concerned there is only one issue, and that is that subdivision Number 4, but whether Birnie wins or loses on that we still feel that even if he loses that there is no liability against the bonding company as a matter of law.

The Court: I understand your position on that,



but I would like to consider all these issues together.

Mr. Pentz: Very well.

Mr. Walkup: Then I offer at this time performance bond dated July 31, 1944, one of the executed originals.

(The document referred to was marked Plaintiff's Exhibit P.)

Mr. Pentz: These are just the bonds that were pleaded, are they, Mr. Walkup?

Mr. Walkup: Yes. These were pleaded under the second cause of action. [20]

Mr. Pentz: Very well, no objection.

Mr. Walkup: I offer next performance bond dated August 28, 1944, one of the original executed copies.

(The document referred to was marked Plaintiff's Exhibit Q.)

Mr. Walkup: I offer next an endorsement to the foregoing two bonds dated October 31, 1944, executed as an original.

(The document referred to was marked Plaintiff's Exhibit R.)

Mr. Walkup: I offer next an undated performance bond—correction, it is dated November 9, 1944, and this is also one of the executed originals.

(The document referred to was marked Plaintiff's Exhibit S.)

Mr. Walkup: Now, in view of the stipulations and the exhibits going in without the necessity of

witnesses to identify them, your Honor, the only testimony that I have to offer on the case in chief relates to the question of attorneys' fees. There is a provision in the Contract VS-14—this is Article 29—which provides as follows:

“And sub-contractor”—which is Birnie—  
“hereby agrees to pay to contractor a reasonable sum as attorneys' fees in all court actions brought by either of them against the other, or in which they are both [21] plaintiffs or defendants, and also in court actions involving off-setting claims between sub-contractor and contractor, because of any jobs, disputes, or actions arising out of this sub-contract, except in the following cases:

“(a) When sub-contractor obtains a favorable net judgment against contractor after consideration of claims and off-sets of contractor which are allowed by the court against sub-contractor, for breach of this sub-contract;

“(b) When contractor is denied a favorable judgment by a court in any suit against sub-contractor which may be brought by contractor.”

I might state in passing that it is the position of Permanente, as set forth in the memorandum of authorities in opposition to the motion for judgment on the pleadings, that the bonding company insures in addition to other things the liability on the part of Birnie to pay reasonable attorneys' fees, if awarded, so that entirely irrespective of the point

under excess profits, by contract if the court awards the Permanente's attorneys' fees, the bonding company which insures all the obligations of the contract would insure that as well, and in this case the attorneys' fees could be a special item.

Mr. Mellin: If your Honor please, at this point may I ask Mr. Walkup through the court whether or not it is Mr. [22] Walkup's position that that provision for attorneys' fees runs also to the benefit of the Maritime Commission.

Mr. Walkup: Yes, and I will stipulate, your Honor, that any attorneys' fees awarded——

Mr. Mellin: I think you misunderstand me. I mean do you contend—not that the fees will go to the Maritime Commission, but the contractual obligation of Birnie to Permanente for contract fees for the benefit of the Maritime Commission——

Mr. Walkup: Yes.

Mr. Mellin: ——the third party beneficiary——

Mr. Walkup: That is correct. As I was going to say, any attorneys' fees awarded up to the extent of the fees that have been paid to us as attorneys for Permanente by the Maritime Commission would be refunded then to the Maritime Commission, and I so stipulate, and that can be a binding admission in the record.

Mr. Mellin: I don't wish to stipulate anything, your Honor, I was just wondering what his position was. We only contracted with respect to attorneys' fees with Permanente, not with the Maritime Commission. This is a sub-contract, so we are going to contend that any fees paid by the Maritime Com-

mission must be deducted in the event they are allowed from any fees by Permanente.

Mr. Walkup: At this time, your Honor, I would like to be sworn to testify on the issue of attorneys' fees. [23]

### BRUCE WALKUP

called for the Plaintiff, sworn.

### Direct Examination

By Mr. Walkup:

I would like to ask counsel, through the Court, if it would be all right if I adopt the narrative form of testimony, and if there are objections to the testimony I will stipulate to it being stricken pending objection.

Mr. Mellin: That is satisfactory.

The Witness: Your Honor, I am an attorney, duly licensed to practice in the State of California, admitted to the Supreme Court of the State of California in 1938, a graduate of the Bolt Hall of Law, University of California. I practiced with Donohue, Rogers and Hamlin in Oakland as an associate from 1938 to 1942, and thereafter with the firm of Thelen, Marrin, Johnson, and Bridges, in San Francisco, as an associate from 1942 to 1947.

I am a member of the bar of the United States District Court for the Northern District of California, and for the Southern District of California.

I was admitted to practice before the United States Supreme Court in 1945. I was admitted to practice before the United States Tax Court, Treasury Department, in 1946.

(Testimony of Bruce Walkup.)

My experience has been largely in trial work with the two firms where I have been associated.

In 1947 I opened my own law offices in San Francisco, and [24] have continued my own law offices for some two years now. However, I have continued to handle litigation for Thelen, Marrin, Johnson, and Bridges in my own office.

I have had considerable experience with the fixing of attorneys' fees with both firms where I have been associated, and in the last two years in my own law offices.

With Thelen, Marrin, Johnson, and Bridges I have handled many cases arising under shipyard contracts. Thelen, Marrin, Johnson and Bridges represented the various shipyards in the Bay area, also in Washington and Oregon and in Southern California during the war, and considerable litigation arose out of those contracts, which I have handled in the Federal and State courts.

Thelen, Marrin, Johnson and Bridges, have a fee arrangement with the United States Maritime Commission whereby that firm is compensated on an hourly basis for all litigated cases at the rate of \$20.00 an hour for any services performed by any partner in the firm or by any associate of the firm in connection with the cases. That arrangement was entered into originally with California Shipbuilding Corporation and accepted by the Maritime Commission in about 1945, and has continued in effect ever since. That is the fee basis between



(Testimony of Bruce Walkup.)

Thelen, Marrin, Johnson, and Bridges and the Maritime Commission approved for these particular cases.

I am personally familiar with the amount of time that [25] has been spent to date in connection with this action by the partners and associates of Thelen, Marrin, Johnson, and Bridges, and it is the practice in that firm to keep all the time sheets, which are kept by each employee and partner in the firm. The time sheets are quite extensive and relate to this as well as other matters for Permanente Metals Corporation extending over in this case a period from August, 1945, to date.

I have had a summary prepared of the hours spent in connection with the particular litigation by the various members of the firm from August, 1945, to January 1st, 1950, and the time amounts to approximately 650 hours. The work included two trips to Washington, D. C.; the first to work with the Maritime Commission in developing the facts involved under the original set of pleadings; the second trip—the first trip, I might state, was from January 15 to February 1st, 1947. A considerable time was spent in checking through the various government records and with the Maritime and Navy Departments to try to develop the facts which were then in issue under the pleadings. A second trip to Washington, D. C., was required for depositions which were noticed by both sides to the litigation, at which time depositions of certain Navy officers were taken and certain Maritime Commission offi-

(Testimony of Bruce Walkup.)

cials. Those depositions were originally scheduled for September 24, 1947, and did not start on the date they were originally scheduled, and were prolonged over at least one week-end, with the result that [26] I was in Washington for the depositions and preparation for the depositions from approximately September 19, 1947, returning to San Francisco on October 4, 1947. Counsel for Mr. Birnie were present at that time in Washington.

There was also involved one trip to Los Angeles to take the deposition of Mr. Birnie, which I believe was completed in one day.

There was extensive work done by various members of the Thelen firm on authorities both before the action was filed and subsequently, the principal legal point involved was the effect of the Vinson-Trammell Act, and that point was researched in great particularity, and because the action has been pending for some four or five years, the research had to be checked and brought up to date from time to time.

There was also research necessary in connection with the liability of the bonding company, and there was considerable research done on a number of other subsidiary points which arose under the original set of pleadings.

Originally, I might state, by the first complaint filed it was charged that this provision for the recapture of excess profits was inserted in the contract by mistake of fact, mistake of law, and I believe by misrepresentation by Permanente Metals

(Testimony of Bruce Walkup.)

Corporation, and it was necessary to research those points, and in addition to investigate the facts surrounding the execution of the contract. [27]

The research consumed some time and the investigation of facts consumed considerable time, because at that time many of the witnesses had left the shipyard and had to be located at other places.

Much of the investigation was conducted either by correspondence or by long distance telephone, and we chased many witness who, when we finally located them, were not helpful as to the facts.

Now, that particular phase of the case; that is, the misrepresentation, the mistake of fact and mistake of law in the execution of VS-14 was abandoned.

The case also involved inquiry under contract VS-28, and the same type of work had to be done with regard to VS-28 as was done with regard to VS-14, but on the investigation different parties were involved to some extent on VS-28.

In addition to research and authorities work and investigation, there were numerous conferences held, sometimes with representatives of the Birnie Electric Company, sometimes among the various members of the Thelen, Marrin, Johnson, and Bridges firm who were working on the case; in addition to that there were numerous court appearances over the period of several years, for setting the case for trial on occasions when it was on the calendar to be set, or on some other motion which required court attendance.

(Testimony of Bruce Walkup.)

The case was actually set for trial on, I believe, two [28] or three prior occasions, and on each occasion considerable work was done in preparation for the trial, each time on a somewhat different set of facts, a different set of contested issues, so that to that extent there has been a considerable duplication of effort in preparing the case for trial on several different occasions.

Now, in addition there was a pre-trial conference, and prior to the pre-trial conference rather detailed requests for admissions were served by both sides. Some of the requests for admissions required my spending, I believe, some two or three days in Richmond, searching the stored records with the custodian of records, attempting to find some of the information which was requested by the opposing counsel, so that that was a rather extended task getting together information for the requests for admissions.

At the time of the pre-trial conference, your Honor requested that the case be briefed by counsel, and rather extensive printed briefs were filed. I believe the brief for Permanente Metals was some fifty-two pages in length, discussing the facts and the applicable law. That work consumed considerable time and is a part of the total hours referred to.

It is my opinion, based upon the—strike that, please. I might state, as was just brought out, that originally there was a complaint for some \$70,000 against Permanente under [29] sub-contract VS-28,



(Testimony of Bruce Walkup.)

which has now been abandoned as to approximately one-half, so that to that extent of the services performed by Thelen, Marrin, Johnson and Bridges, they resulted in a saving of some \$35,000 as against the amount originally contended for by Birnie Electric Company. The amount originally in dispute in this case, when you consider the complaint by Birnie on the one hand and the off-setting cross-complaint by—the complaint by Permanente and the off-setting cross-complaint by Birnie amounted to a net difference of approximately \$262,000. Permanente was suing for One Hundred and Fifty Thousand odd dollars, and Birnie was originally cross-complaining for \$111,832, so that with the net difference of Two Hundred and Sixty odd thousand dollars involved the case was handled on a very thorough basis, both on questions of fact and questions of law.

It is my opinion, based upon the amounts involved in this action, the responsibility involved, the time involved in all of these matters which I have detailed, and assuming a favorable result, because unless there is a favorable result we are not entitled to any attorneys' fees in any event, that a reasonable attorneys' fee to be allowed in this case, assuming a successful result, would be \$25,000, covering work to date, plus anticipated future work before the case is finally concluded, and, as previously stated, any such fee awarded would be credited to the Maritime Commission to the [30] extent of fees previously billed and paid.



(Testimony of Bruce Walkup.)

Cross-Examination

By Mr. Mellin:

Q. Now, your opinion as to the reasonable value of the services are one hundred per cent greater than the Maritime Commission actually agreed to pay, is that a fact? Six hundred and fifty hours I have it at \$20.00 an hour is \$13,000.

A. That is up to January 1, 1950.

Q. I see.

A. I neglected to state there has been considerable work since January 1st to the trial date, and I believe I stated at the end of my testimony that that would include anticipated future work.

Mr. Mellin: You think the trial will be about two days?

A. I have in mind the possibility of appeals by either side.

Q. But wouldn't you say that \$20.00 an hour would be a reasonable fee?

A. Yes, I believe that \$20.00 an hour would be a reasonable fee for work to date, and if we knew definitely what amount of hours was to be consumed in the future, plus what has been consumed between January 1, 1950, to date, and add it all up, that would be a reasonable fee.

Q. Now, you recall that there was litigation between the same parties in the Southern District entitled *Birnie versus Permanente*? [31]

A. Yes, I do.

(Testimony of Bruce Walkup.)

Q. Does this 650 hours take into consideration the work that was done there?

A. No, it doesn't. I very carefully kept separate records on the two actions, and in preparing the summary which I referred to, which arrived at the total of some 650 hours, eliminated every item referring to the Southern District action. I believe there may be about two hours included in the total of 650 which are improperly charged and should be charged to the Southern District action.

Q. Now, how much of this service has been paid for heretofore directly by the Maritime Commission?

A. The method of payment is Permanente—Thelen, Marrin, Johnson, and Bridges bills Permanente Metals Corporation. Permanente Metals Corporation pays Thelen, Marrin, Johnson and Bridges and then requests reimbursement by the Maritime Commission. It is my understanding that all of the hours billed to Permanente have been paid to Thelen, Marrin, Johnson and Bridges by Permanente, and in turn reimbursed to Permanente Metals by the Maritime Commission.

Q. At the rate of \$20.00 an hour?

A. Yes.

Q. So actually your firm or yourself have been paid by the Maritime Commission through Permanente?

A. That is correct. [32]

Q. Now, on these trips to Washington, Mr. Walkup, you also had other matters of the Mari-

(Testimony of Bruce Walkup.)

time Commission to take up in Washington at that time, didn't you?

A. I believe I did. On such occasions the time charged to this case was only the hours actually spent, and on travelling the time was pro rated among the various cases.

Q. That is what I wanted to ask you. That was true on both of these trips to Washington?

A. That is correct. I believe the records were kept as to each case, and the time traveling would be pro rated to the various matters.

Q. How many days have you assumed it is going to take, assuming appeal, from now on in this case, Mr. Walkup?

A. Well, I don't think that it is possible for me to estimate that, there are so many intangibles. It would depend on whether there was an appeal to the Circuit Court or Supreme Court, how extensive the briefs were, whether or not it is necessary to go to Washington, D. C.,—

Q. So your additional \$12,000 estimated fee was based purely on guess?

A. Speculation, I would say, rather than guess.  
Mr. Mellin: That is all.

(Recess.)

The Clerk: Number 26215, Permanente Metals vs. Birnie.

Mr. Walkup: Under the third cause of action, your Honor, [33] with reference to the admitted liability of \$1545.66 for goods and services fur-

nished, I would like to offer in evidence at this time an itemized invoice showing the dates that those goods and services were rendered, which was some five years ago, with reference to the question of interest, or possibly to save cluttering up the record counsel could stipulate that all the services were rendered between December 30, 1944 and March 31, 1945, as shown by the invoices?

Mr. Mellin: So stipulated.

Mr. Walkup: At this time, your Honor, the plaintiff rests.

#### Opening Statement on Behalf of the Defendants and Cross-Complainants

Mr. Pentz: Your Honor please, this law suit has only two issues: The first issue as to the legal effect of special provision 4 of VS-14; the second issue is as to whether or not the bonding company is liable, no matter who prevails, insofar as the first issue is concerned.

The evidence that we will propose to offer will show a situation posed by the Navy in this war which was distinct and different from the type of situation that had theretofore been any type of military problems, and that was the matter of [34] transports.

The type of vessel which is the subject matter here was designed for a particular naval objective, and that is the type of vessel which is known in Naval parlance as an ANA—that is, Naval Personnel Attack.

The early type of vessel also was designed for a particular naval objective. Prior to this war a

transport in military parlance in this country only meant a ship with facilities to carry men and that was all, and as many men as possible, for the reason that it was used from a friendly port of embarkation to a friendly port of disembarkation, and hence men that might be transported sleeping in three shifts a day in barracks would have an opportunity for rest and recreation after disembarkation to be at top form and fit for combat.

There came a time in this war when that type of transport was no longer acceptable, because of the geographical problem involved, a problem that required that combat troops be transported direct to the points of combat and landed on hostile shores at the peak of physical fitness ready to fight.

Thus was born and conceived the APA, a special type of vessel, which we will show was conceived by the Navy, ordered by the Navy, intended for Naval use, was actually used by the Navy and served a particular purpose.

And thus it was that on November 9, 1943, Admiral Leahy, who was at that time Chief of Staff of the Commander-in-Chief of the Army and Navy, and who in a letter of November 9, 1943, [35] acting for the joint chiefs of staff, sent a letter to Rear Admiral E. S. Land, Chairman of the Maritime Commission, and this letter will become of important bearing in the issues of this case, and the reason that this letter becomes important is, and we will be able to show, that it initiated a line of correspondence between the Navy and the Maritime Commission insofar as these particular twenty-two vessels are con-



cerned, which shows that they were intended for naval vessels. The issue or the fact which this type of evidence becomes important for, as to whether the vessels were for the Navy, is because we intend to show that our contractual relations are covered by the Vinson-Trammell Act, and the Vinson-Trammell Act has to do with naval vessels, so it becomes important in this case to know whether or not these vessels are naval vessels, in view of the test in the northern Pacific case, whether they were intended for that use. So the letter of Admiral Leahy of November 9th becomes important because in that letter, addressing himself to the chairman of the Maritime Commission, he states, "It is requested that the Maritime Commission construct 130 standard APA's and 30 standard AKA's to be completed as early in the fourth quarter of 1944 as practicable."

And it is interesting to note that in that connection he describes the vessels as military types——

Mr. Walkup: Pardon me, could I interrupt [36] at this moment?

I will have objections, your Honor, to the introduction in evidence of certain documents that counsel is now arguing from. It is true we admit the authenticity of the documents, and we do not object to the use of copies by stipulation instead of originals subject to all objections.

Now, I think counsel should offer these various documents, at which time we could interpose our objections and have a ruling, and if they are ruled inadmissible it would be improper to argue about them. I don't know whether this is an opening statement or argument.

Mr. Pentz: It is an opening statement, and I intend to pass briefly upon the type of evidence I want to introduce in this case, and also at least one point of law involved. I do not intend to recapitulate all the points of law raised in our pre-trial conference. I expect to speak only of one which has been unanswered. This is an opening statement, Mr. Walkup.

Mr. Walkup: It is understood we reserve our objections to the various documents that you are going to talk about.

Mr. Pentz: I have not introduced them or even attempted to.

The Court: Proceed.

Mr. Pentz: Now, when in his letter of November 9, 1943, Admiral Leahy asked the Maritime Commission to construct 130 APA's, he described them as being military types. He states [37] "It is appreciated that the building of these military types will unavoidably result in a considerable reduction in dry cargo tonnage, and it is recommended that this reduction be held to a practicable minimum."

He also states, "It is noted that military types already on order are being delayed."

Now, that letter, which we will offer into evidence, we will show touches off a series of events. In the first place, we must remember that at that time our prime contract, 15762, has been in being about six or seven months. It's date is April, 1943. Admiral Leahy's letter is November of 1943.

The first keel on the first of our twenty-two vessels was not laid until May of the following year. So

that when we interpret this contract, this prime contract, we are not dealing with ships that had been built, but we are dealing with only ships which were to be built, as events turned out, with the twenty-two vessels we are disputing about, and it is stipulated they were a part of the 130 APA's requested by Admiral Leahy.

Now, the events that I expect to show that that letter touched off were these: Immediately the Maritime Commission corresponded with the Navy, much of it between the Hon. James Forrestal, the Secretary of the Navy, and the Maritime Commission, in which they agreed upon the details of this program of ship procurement. [38]

Those letters will be material to show that these particular twenty-two vessels under our sub-contract were intended for use by the Navy. Our evidence will show that they were accepted by the Navy, commissioned by the Navy, given Navy numbers, Navy names, actually used in the prosecution of the war with the combatant fleet.

Now, what was the law as it existed at that time? Prior to the war, prior to 1940 there had been developed a plan for so-called profits limitation in the Vinson-Trammell Act. And, incidentally, your Honor, if there is any desire on your part to skim over this statute as I remark concerning it, I have an extra copy of our pre-trial statement here available for that purpose.

The plan that existed prior to 1940 was in the Vinson-Trammell Act, and it in effect stated that all of such contracts and sub-contracts should re-

quire a provision whereby the contractor promised and agreed to pay back everything that we received in excess of ten per cent of his stated contract price. But a significant change occurred in 1940, because it was in connection with the Internal Revenue Act of 1940 and specifically Section 401 of that Act that Congress reflected in its wisdom a change in public policy insofar as what manner or means should be adopted by this country in the defense efforts to limit war profiteering.

In adopting the 1940 Revenue Act, Section 401, Congress [39] stated that this provision in the Vinson-Trammell Act requiring the return of excess over 10 per cent should be repealed—should be suspended, rather, during the period that the excess profit tax would be in effect, but Congress went further, as though to say, “And there shall be no effort to avoid the policy that we consider to be wise in this country,” because in Section 401 of that Revenue Act, Congress went on further to say that any agreement to pay into the Treasury profits in excess of 10 per cent of the contract price of any such contract or sub-contract shall be without effect.

Now, why did Congress adopt that legislation?

In the House Report, if your Honor please, in discussing the policy that Congress desired to incorporate in this so-called repealer of the Vinson-Trammell Act, the following statement was made, and this is revealing of the public policy and it is the basis upon which we feel our contention—that is, one of the chief bases why we consider our position in this case to be sound:



“In this report on the revenue bill of 1940, your Committee expressed the desire that the re-armament program should furnish no opportunity for the creation of new war millionaires or the further substantial enrichment of already wealthy persons. Your Committee is still of this opinion, but, at the same time, deem it advisable to stipulate the cooperation of private [40] enterprise in the defense program by suspending the profit limitation of the Vinson-Trammell Act, applicable to the construction of naval vessels and Army and Navy aircraft. In addition, it is considered desirable to provide special amortization with respect to the facilities necessary in the national defense, in order further to encourage the participation of private enterprise in the re-armament program.

“While these benefits are being accorded to business engaged directly in the defense program, your committee feels that they should be accompanied by a general excess profits act, rather than one limited to contracts for Army and Navy aircraft and naval vessels, or even to munitions manufacturers generally. Accordingly, the tax provided in the bill will apply to corporate profits from all sources. This is felt desirable since the segregation of profits directly attributable to the expenditures of the Government for the defense program presents insuperable difficulties.

“Upon thorough examination, it appeared that the excess-profits tax should apply only to corporations”—now this is important—“as individual and partnership incomes are subject to heavy surtaxes



upon net income, whether or not left in the business, while, [41] in general, neither corporations nor their stockholders pay surtaxes upon earnings which are not distributed. Moreover, since all of the assets of an individual, whether he be a sole proprietor or a member of a partnership, are at the risk of the business, it is extremely difficult, if not impossible, to determine the capital actually invested.

“Since the proposed excess-profits tax will apply to all corporations, including corporations now subject to the special profit-limiting provisions of the Vinson-Trammell Act, it is felt that such special provisions should not apply while the excess-profits tax is in force. Uniformity will thereby be achieved in the treatment for tax purposes of all abnormal profits resulting from the national defense program. It is not believed that the limited types of businesses affected by the Vinson-Trammell Act should be treated, during the period in which the excess profits tax applies, differently from the way in which other businesses engaged in production for the national defense are treated.”

In other words, Congress said that there should be one uniform way for the control of profits in naval contracts, and that was the way that every other citizen was treated in other types of national programs, and that was the income tax, [42] because individuals had high surtaxes, and those were paid after excess-profits tax for corporations, and there would be a positive hindrance to private enterprise so far as the naval program was concerned to single them out and treat them differently.

Now, Mr. Walkup contends that this is of no connection to the issues of this case, because he will argue, as he has revealed in his pre-trial statement, that our prime contract was not signed by the Secretary of Navy. Now, that is virtually his case.

Mr. Walkup: I would like to be heard myself on that point.

Mr. Pentz: Naturally, Mr. Walkup, I am only trying to reflect your pre-trial statement. I may not be entirely accurate, but one of the chief points involved in Mr. Walkup's case is the fact that our prime contract was not signed by the Secretary of the Navy, or that it was not a naval contract, because he would have us believe that since the Vinson-Trammell Act refers to contracts which are signed by the Secretary of Navy, that unless we can bring ourselves within that narrow opening, that we cannot have the benefit of the Vinson-Trammell Act, or its repealer in Section 401 of the Revenue Act.

Now, I am going to dwell on only one point of law which has not been answered by Mr. Walkup in his pre-trial statement [43] of position, nor even has there been any endeavor to answer it, and I submit that it is unanswerable. In prime contract MCE-15762, which is Plaintiff's Exhibit A, it is provided in its preamble that it is made pursuant to public law 247 and 630. In its first paragraph it states, "Under the provisions of Public Law 247 and 630 (77th Congress) the Commission is authorized to contract," et cetera, et cetera.

Now, an examination of Public Law 247, although it is an appropriation act, reveals that in its last provision it states that the provisions of Sections 2 and 4 and the several proviso clauses contained in Section one of said act of February 6, 1941, which is Public Law 5—let me repeat and interpolate, the last provision of Public Law 247 states that the provisions of Public Law 5—Section 4 of Public Law 5 shall apply to all the activities and functions which the Commission is authorized to perform under this title. The contract incorporates Public Law 247, Public Law 247 incorporates Public Law 5, and Public Law 5 is essentially important because it is, insofar as I know, one of the only two authorized statutes directing the extent the Maritime Commission is authorized to go, and it is important because it says in its section 4 the Commission is authorized to construct, reconstruct, repair, equip, and outfit by contract or otherwise vessel or parts thereof—and this is what is important—for any other department or agency of [44] the government to the extent that such other department or agency is authorized by law to do so for its own account—to the extent that such other agency is authorized by law to do so for its own account.

Now, since there were only these two basic authorizations for the Commission to act—one was in the Maritime Commission Act of 1936 which gave the Commission power to build ships for private enterprise, such as passenger vessels, cargo ships under the so-called financial subsidy program, with

which we are not concerned here—the only other authorizing provision of law is Public Law 5, which states, and I repeat, that the Commission is authorized to build ships for any other agency of the Federal Government to the extent that such other agency is by law authorized so to do for its own account.

Our prime contract MCc-15762 incorporates Public Law 247, Public Law 247 incorporates Public Law 5, and Public Law 5 states that it is limited in its construction for another agency to the extent that such other agency is limited.

Now, if it be conceded that if our prime contract has been executed by the Navy—if that were true Mr. Walkup must admit that the special provision number 4 for the repayment back of everything over 10 per cent is without effect. He acknowledges that when we addressed your Honor at our pre-trial conference, and I am quoting Mr. Walkup, when he said as follows: [45]

“Now, our contention is that the contracts were not with the Secretary of Navy, but were with the United States Maritime Commission, and that the Vinson-Trammell Act has absolutely no application to contracts of this kind. If these were contracts which Mr. Birnie entered into with the Secretary of the Navy for construction of or outfitting of a vessel in a Navy yard, as many contractors do, we would not be permitted to include in the contract the limitations on excess profits. However, these particular contracts were entered into under Public Laws relating to the Maritime Commission. The



prime contract was between Permanente and the Maritime Commission, and the sub-contract was between Birnie and Permanente, but under the Maritime Commission set-up was not a sub-contract which would come under the Vinson-Trammell Act."

So Mr. Walkup agrees with me that if the Secretary of Navy or the Navy Department had executed our prime contract, this return of excess profits undertaken under Special Provision 4 of VS-14 would have no effect, because the repeal of the Vinson-Trammell Act stated it could not, but if the navy could not do it, then the Maritime Commission could not do it, because of Public Law 5, and if the Maritime Commission does it, it does it in excess of the authority under which the Navy Department could do it under the law, because when public law [46] states that the Maritime Commission may construct these vessels only to the extent that such other governmental agencies are authorized by law to do, we conclude, and it is unsailable, that if the Secretary of Navy could not have inserted that proviso, which Mr. Walkup agrees he could not, then the Maritime Commission likewise cannot, and, thus, when the Maritime Commission, through its prime contractor—not the sub-contractor but the prime contractor, had that proviso put in, it was doing so beyond its authority, because the Secretary of Navy himself could not.

Thus, having established that our contract does come within the terms of the Vinson-Trammell Act



repealer, all we have to do, then, is to show that the vessels were intended for naval use.

The Addendum Number 2 to the prime contract acknowledges as much, because in addition to the correspondence which shows them to be naval vessels and intended as such, the prime contract in its Addendum Number 2, which is already in evidence and which gave birth to our VS-14, states:

“Under date of April 22, 1943, the Commission and the contractor entered into a contract (herein called the ‘Vessel Contract’)”—and they are referring to the prime contract—“for the construction of seventy-seven cargo vessels in accordance with plans and specifications designated ‘design VC-2-S-AP2’”; [47]

“The Commission has heretofore directed the contractor to complete 22 of such vessels as combat loaded troop ships (design VC2-S-AP5) thereby greatly increasing the scope of the work to be performed under such contract.”

Thus, if your Honor please, we find that this is not a question as to whether or not Mr. Birnie is going to retain inordinate profits at all, this is a case to determine whether the Maritime Commission receives these funds for its own budget purposes or whether the Department of Internal Revenue in income tax just refunds to the extent that the income tax and its high surtax is applicable to Mr. Birnie, and we maintain we are entitled to have the benefits of applying losses against profits as every other individual in an income tax situation is entitled, and that just because Mr. Birnie hap-

pens to be engaged in the construction of a naval vessel, he should not, because of that fact, be penalized and set apart, and we maintain it was the policy of Congress that such should not occur.

With regard to the bonding company, as I mentioned earlier, we consider that as a matter of law the bonding company is not liable for any of these claimed over-payments, no matter who is on the Birnie-Permanente issue, for the reason that this special provision for in our VS-14—and again that special provision 4 of VS-14 is the paragraph [48] where we are charged with this promise to repay to the Commission these excesses over 10 per cent—in that Special Provision 4 it is provided that, and I will quote one partial sentence, “although the accounting for profit payments to be made under the provisions of this article shall be in accordance with the provisions of Section 505-B of the Merchant Marine Act of 1936, as amended,” et cetera, et cetera—the important thing being that the payments to be made under the provisions of this article—being the so-called excess profits over 10 per cent—shall be in accordance with the provisions of Section 505-B of the Merchant Marine Acts, “but the surety under such contracts shall not be liable for the payment of such excess profits.”

We submit, your Honor, that where in VS-14 provisions of Section 505-B of the Merchant Marine Act of 1936 are expressly incorporated by a reference, that that portion of 505-B which says, “but the surety under such contracts shall not be liable for the payment of such excess profits” is incor-

porated in our sub-contract just as much as though it expressly had been incorporated therein, and we submit there is no rule of interpretation, there is no rule of construction in any logical view that can write that out of the provisions of our sub-contract, and that if the interpretation of 505-B meant anything—unless you are going to say it meant nothing, which we cannot do, it meant that the surety under such contract [49] shall not be liable for the payment of such excess profits tax, exactly as it is therein so stated.

That is the conclusion of my opening statement, if your Honor please.

Oh, Mr. Mellin has called my attention to two things that I intended to comment briefly on, and that is insofar as any possible liability of the bonding company for attorneys' fees is concerned, we take the position that if the bonding company is not responsible or liable in any way for the return of the so-called excess profits for which suit is brought, it cannot conceivably be liable for attorneys' fees for a suit brought to produce the result for which it is not primarily or in any way responsible, and the second point is that, that Mr. Walkup has dwelt in passing upon the failure of Mr. Birnie to file sworn statements of his costs and other material that the Maritime Commission is by virtue of the terms of Special Provision 4 entitled to have.

I wish to comment briefly on that. There are two answers: In the first place, it is immaterial—I will withdraw that. I had assumed we had stipulated to the actual making of that final deter-

mination, because there is no dispute between us, and therefore whether he had or had not filed this report would have been immaterial, because we are stipulating as to what their final determination was, and it is correct. I mean the reason why Mr. Birnie did not file this report is because [50] we have always felt, and we still feel, and that is what this lawsuit is all about, that something in special provision 4 is enforceable against us. That is the nub of the whole lawsuit, and we had followed the procedure set forth in Special Provision 4, we would have been flying in the face of the various contentions we are making in this lawsuit, estoppel, waiver, and other contentions. So any records I am prepared to introduce in this lawsuit as to costs and other material called for by special provision number 4 are not to be deemed as a waiver of or inconsistent with our position that the entire provision is without effect for the reasons I have mentioned.

Actually, I think Mr. Walkup may be willing to stipulate with me that all of Mr. Birnie's records were available to the accountants and field men for the Maritime Commission, and they spent weeks going through his records, and there was no effort to not make a full disclosure. The only thing was we could not follow the provisions of that special provision number 4 and at the same time contend it has no effect.

The Court: Now, Mr. Walkup, indication has been made to you of certain evidence which will be documentary which will be offered by the defendant, and you have indicated that you are pre-



pared to make objections. I think perhaps I might hear from you as to the grounds of your objections.

Mr. Walkup: Yes, your honor. It will entail a rather [51] lengthy presentation, your Honor, and largely a repetition of what has been previously briefed.

In making the presentation of our evidence, I did not make an argument on the law, because it was thoroughly briefed in the pre-trial statement of position filed with the court. Anything I would now say would be a repetition of that.

The Court: Don't do that. It is now 4:00 o'clock, and if you have nothing further to give me, other than what you have already given me in your brief, then over the holiday I will look those over and be in a position to rule on the matters as they come up Thursday.

Mr. Walkup: Perhaps I could assist the court in this respect: The various documents to which I will offer objections break down into three or four chief classes. For example, certain documents relating to title to these vessels long after they were built, some three years afterwards, title by agreement between the Maritime Commission and the Navy was given to the Navy as part of a trade for other vessels. Now, I will have one objection to all testimony going to that phase of the case; that is, subsequent title to the vessels, which has nothing to do with the construction of them.

Then there will be objection to other testimony which will be offered as to what the Navy called these vessels and what the Navy did with them



after they got them from the Maritime Commission, our position being that Permanente built [52] them for the Maritime Commission, delivered them to the Maritime Commission under a Maritime Commission contract, and that after that anything that the Maritime Commission did with them in delivering them to the Navy or anybody else is immaterial so far as the issues of this case are concerned.

That will be another line of testimony to which we will object.

And another line of testimony to which we will object will be the series of negotiations between the joint chiefs of staff and the navy and the Maritime Commission with reference to modifications in these various vessels which were being built by the Maritime Commission, and I think we can serve the Court by breaking those documents down into classes and preparing my objections to each class so that possibly we won't have to object to questions and answers, but merely have a running objection as to types of testimony.

Mr. Mellin: If your Honor please, I would like to ask Mr. Walkup if it is not so, as we understand his position, he will object to any questions and any evidence attempting to show that these are naval vessels in support of our position under the theory of law and the theory of authorities, and will attempt to stand on the contract purely as written? We think that the objection goes to that one complete line, and it may—of course, we feel that sustaining that objection is tantamount to deciding that the law which we have cited [53] to the Court

is not applicable to this situation, and would withhold from the Court the salient facts showing these are naval vessels within the purview of the case Mr. Pentz has mentioned, so if the Court could rule on the objection to that line of testimony and in the event the Court ruled that it wasn't material then the objection that Mr. Walkup has could go to all of our testimony, because that is the point of our testimony.

We understand there is only one factual issue: Are they naval vessels within the meaning of the acts and the authorities and everything else?

Mr. Walkup: There is one point I would like to emphasize since your Honor is going to review these briefs over the holiday, and I don't believe it is stressed in the pre-trial statement of Permanente to the extent it should be, and that is the point of Section 401 of the Revenue Act of 1940 repealing the profit limitations provision of the Vinson-Trammell Act. Now, counsel have argued in their brief that Congress by this section 401 of the Revenue Act of 1940 intended to set up an overall scheme for control of profits on all naval vessels construction. However, Section 402 of the same act passed by the same Congress sets up a similar profit limitation suspension on Maritime Commission contracts, although Congress clearly distinguished between Maritime Commission contracts and Navy contracts, and in Section 402 the suspension [54] of the profit limitation provision applied only on Maritime Commission contracts, and the profit limitation was suspended only where the prime con-

tractor and the sub-contractor were both corporations.

Now, Birnie is not a corporation, and, therefore, the suspension of Section 402 of the Revenue Act would not apply to Birnie, because he is an individual, and it only suspends limitations as to corporations.

Now, therefore, Birnie has got to convince the court that this is a Navy contract rather than a Maritime Commission contract, because if it is a Maritime Commission contract, then Section 402 suspends the profit limitation as to corporations but not as to individuals like Birnie. So he has got to sidle over from a Maritime Commission contract, which we state this very clearly was, and make it into a Navy contract. Congress was quite clear in specifying that the Vinson-Trammell Act related to Navy contracts, contracts made by the Secretary of the Navy. No authority has been presented to the Court by Birnie that the Vinson-Trammell Act profit limitation suspension applies to Maritime Commission contracts.

Congress specified Navy Contracts, contracts having to do with naval vessels and contracts having to do with Army and Navy aircraft. They at no time specified contracts having to do with Maritime Commission vessels. Maritime Commission [55] contracts were covered by Section 402, passed by the same Congress, and which left individuals out of the benefits, and that point is covered under Section 3 of Permanente's pre-trial statement starting on Page 38, and continuing through Page 40. It is

a brief presentation, but it refers to congressional committee reports, and as an appendix B to our pre-trial statement of position, we set forth the text of Section 402 of the act, but the important sentence as far as this litigation is concerned is the last sentence under A of Section 402, which says that sub-section (j) only applies when both the principal contractor and the sub-contractor are corporations.

So Mr. Birnie, in order to get relief, not being a corporation, is forced to try to convince the court that he comes under an act covering naval construction, rather than Maritime Commission construction.

I want to emphasize that point, because it is not emphasized in the pre-trial statement of position.

Mr. Pentz: I feel, your Honor, when you get an opportunity to read our brief you will find adversely to Mr. Walkup's position, because we maintain that as soon as you start building naval vessels, vessels intended for the use of the Navy, you are not under Section 402, as contended by Mr. Walkup in any way at all, but you are under Public Law 5, which is the point I mentioned to the effect they have no more [56] authority once the vessels are destined for the use of the Navy.

That will be seen by going over our briefs.

The Court: May I inquire of counsel how long you think it will take to put the evidence in in this case? Will one day be sufficient?

Mr. Pentz: Yes, your Honor.

Mr. Walkup: I believe so, your Honor.



The Court: All right, Thursday.

(Thereupon the further hearing of this matter was continued until Thursday, February 23, 1950, at 10:00 o'clock a.m. [57])

Thursday, February 23, 1950, 10:00 A.M.

The Clerk: Number 26215, Permanente Metals Corporation vs. John Birnie, et cetera, et al.

Mr. Walkup: Ready.

Mr. Pentz: Ready.

The Court: Very well, you may proceed.

Mr. Pentz: Have you rested?

Mr. Walkup: I rested, yes.

Mr. Pentz: I will call Commander Herman Barter.

HERMAN BARTER

called for the defendants, sworn.

Direct Examination

By Mr. Pentz:

Q. Where do you reside?

A. Sierra Madre, California.

Q. How long have you resided there?

A. Over four years.

Q. Are you a member of the United States Navy? A. Yes.

Q. And what is your rank?

A. Commander, on the retired list.

Q. Your status is on the retired list?

A. Yes.

Q. Over what period of time have you been connected with [58] the United States Navy?



(Testimony of Herman Barter.)

A. I entered the Navy in June of 1917, and I have been connected with it continuously since then.

Q. Now, briefly, Commander, will you give us your naval experience in the United States Navy up until approximately 1941?

A. I entered the Naval Academy in 1917, graduated in 1921, in June. From there I was assigned to the battleship Mississippi in the Pacific fleet, and was aboard her for a little better than two years, and then over on the Yangtze Patrol in China, and was in China from 1923, returning in the early part of 1926.

I was assigned to a vessel, a destroyer, European forces, and I served on that vessel until about July of 1927. At that time I was hospitalized as a result of an infection I had picked up in China, and I was hospitalized for about fifteen months.

At the end of that time I was assigned as Personnel Officer for the receiving ship, Philadelphia Navy Yard. In November, 1930, I was assigned to an auxiliary vessel as her navigator and served as her navigator for thirty-nine months, until January of 1936, the last nine months of that time as her executive officer or second in command. On that vessel I was assigned as Assistant Ship Superintendent in the Navy Yard, Philadelphia, and served in that capacity until—that was— [59] did I say 1936, the Philadelphia Navy Yard?

The Reporter: Yes.

The Witness: That should be 1934. I was thirty-nine months, from 1930 to 1934. I served as As-

(Testimony of Herman Barter.)

sistant Ship Superintendent, Philadelphia Navy Yard, until April, 1936.

At that time I was assigned to the battleship Texas, and served on the battleship Texas until April of 1939.

From there I was ordered to duty at the branch Hydrographic Office, San Pedro. After being on duty approximately a month, I was ordered for physical examination for promotion, and as a result of the previous hospitalization and inspection I was ordered to the San Diego Hospital and subsequently retired.

Q. (By Mr. Pentz): Were you ordered back to duty around 1940?

A. I was ordered back for duty and reported for active duty again in July, 1941.

Q. What was your duty as of that time?

A. I was ordered to duty in the office of Chief of Naval Operations of the United States Navy, in Washington, D. C.

Q. How long did you serve in the office of the Chief of Naval Operations of the United States Navy?

A. From July, 1941, until my detachment the first of October, 1945.

Q. Now, Commander, does the office of Chief of Naval Operations of the United States Navy have a function to [60] perform as regards the characteristics of vessels to be procured by the Navy?

A. Yes.

Q. What is that function?

(Testimony of Herman Barter.)

A. It is to establish the military characteristics required of the vessels for the services which they are expected to perform.

Q. And when you say the services which they are expected to perform, do you have in mind a military object that might be in the minds of the Navy?

A. Duties and military objectives, yes.

Q. Now, Commander, I call your attention to a group of twenty-two vessels which in the Navy were known as APA's and with naval numbers 204 through 225, inclusive. Are you personally familiar with the type of vessel represented by those twenty-two vessels?

A. Yes.

Q. And in my questions, Commander, when I refer to the vessels, subject matter of this lawsuit, will you please understand that I am referring to those twenty-two vessels you have just testified you are familiar with?

A. Yes.

Q. Now, in the office of Chief of Naval Operations, is there an officer whose duty it was to determine the characteristics of the vessels which became known as naval APA's [61] 204 through 225, inclusive; in other words, the vessels the subject matter of this lawsuit?

A. Yes, sir.

Mr. Walkup: Your Honor—pardon me, may I have the answer stricken pending objection?

The Court: Well, it will be understood your objection precedes the answer.

Mr. Walkup: Yes. At this time I would like to enter a general objection to any testimony as to the

(Testimony of Herman Barter.)

Navy Department's connection with these particular vessels involved in this litigation at any time as being not binding on Permanente Metals Corporation or Birnie. It is the same point that I mentioned briefly the other afternoon, and possibly I am premature and should wait until he gets to the specific questions.

The Court: Well, I am prepared to make my ruling upon these objections that I sense are going to be made by you as the evidence progresses. As I understand it, the crux of the controversy between Permanente and Birnie is whether or not they are naval vessels. I think it is expeditious to receive this evidence, and should I finally decide the case in accordance with Permanente's theory, the implication necessarily would be that I have given no consideration to this evidence to which objection has been made. In that event, of course, no injury would result to the plaintiff from the ruling. [62]

However, there would be a saving of time in resolving the issues in favor of the party who finally prevails, because if I decide in favor of the plaintiff's theory and the reviewing court decrees the judgment should follow the theory for which the defendant contends, the record would be complete. So, for those reasons I am going to overrule the objection you just made and the objections which I sense you intend to make, and receive the evidence. The objection is overruled.

Mr. Walkup: May we, your Honor, in order to avoid continuous objections as the testimony pro-



(Testimony of Herman Barter.)

ceeds, and in the interest of an orderly presentation of the evidence, have a running objection to any such testimony as to the activities of the Navy before or after the construction of these vessels? It will save my continuously interrupting with specific objections.

The Court: There is no objection to a running objection?

Mr. Pentz: No.

Mr. Walkup: Thank you, your Honor.

Q. (By Mr. Pentz): Commander, who was the officer in the office of Chief of Naval Operations, United States Navy, whose duty it was to determine the characteristics desired by the Navy that were incorporated in the vessels, the subject matter of this litigation? A. I was that officer. [63]

Q. And did you hold that duty continuously through the time of your duty with that department of Chief of Naval Operations?

A. My answer to that question is yes, for this particular naval designation, APA.

Q. Now, in the procurement of the vessels covered by this lawsuit, what was the military objective in the mind of the United States Navy?

A. The objective and requirement was to have a sufficient number of this type of vessel to take troops from a friendly port and enable them to land in enemy territory and land in a fighting condition and to give them protection when they were nearing the enemy shore from aircraft, and give



(Testimony of Herman Barter.)

them as much protection as possible prior to and during the landing.

Q. Now, what characteristics were incorporated in the type of vessel represented by these vessels in our lawsuit? What characteristics were incorporated in those vessels to facilitate these military objectives?

A. One thing, the protection of troops when nearing the enemy shores from enemy aircraft was to afford heavy anti-aircraft armament. In the bow we replaced what had been a five-inch gun on other vessels of this type with a 40-millimeter quad. Prior to these particular vessels that you are referring to, of armament, about the best we have had or required was two 40 twins on the after quarters of the ship; in other words, two 40-millimeter twins or four 40-millimeter guns. [64] These particular vessels carried twelve of those parallel. In addition, we had approximatey fourteen, maybe sixteen of the 20-millimeter guns.

Q. That latter category was additional armament? A. Additional armament, yes.

Q. —to that which you have been describing?

A. We felt that necessary because these vessels were required for the Japanese invasion, and during the final ferrying operations we had been having Kamakaze attacks in increasing numbers, and this additional armament was put on for that reason.

In addition, these ships carried landing craft of two types. One was a 36-foot landing craft to land

(Testimony of Herman Barter.)

personnel and vehicles. The ship was equipped with triple bank whaling davits——

Q. May I interrupt you there, Commander: Have you exhausted your information as to the facts insofar as the landing craft that were put on these vessels?

A. There were two types, the 36-foot for landing personnel and vehicles, and the fifty or sixty foot what we call tank ladders, LCN-3 or LCN-6. One was a fifty foot tank ladder and the other was a 36-foot landing craft.

Q. Insofar as the characteristics of this type of vessel were concerned, where were those landing craft to be stowed?

A. They were stowed top side, they were stowed in cradles [65] and with these cradles triple banked whaling davits were provided. That economized deck space. We sacked them one on top of another, and the other in the davit, which meant each davit would accommodate three of the LCN-3's or LCN-6's. We did that for the purpose of getting the maximum number of that type of landing craft, because that was the kind that got the troops ashore, the LCN-3's or LCN-6's.

Q. The LCN-6 is the other type of landing craft?

A. The other type that was carried, and the ships had to be equipped with a boom of at least a 30-ton capacity to make this type of landing craft water borne.

(Testimony of Herman Barter.)

Q. Was that type of boom arrangement different from ordinary types of cargo vessels?

A. May I clarify that question? Do you mean the ordinary merchant cargo vessel, or Navy Cargo vessel?

Q. Well, either one, or both.

A. Well, it depends upon what was the service of the cargo vessel. Ordinarily with the boom of any vessel that we acquired we usually had to provide additional handling facilities of thirty tons for the LCN-3's or LCN-6's.

How that boom capacity compared with the ordinary merchant cargo vessels, I would state to my knowledge that the usual boom capacity was around a ten-ton capacity. There might be exceptions.

Q. Commander, will you proceed to describe other characteristics [66] that were incorporated in this type of vessel to meet these particular military objectives.

A. Another characteristic that we considered very important and required was what we call the ship must be a two-compartment ship, and the ship was changed structurally, if necessary, for additional bulkheads or for a cargo space or of such size bulkheads were added and ballasting were added, if necessary. By two-compartment ship, that was a stability condition required whereby an underwater hit at a bulkhead and two compartments were flooded at the same time, the ship would have a reasonable chance of surviving. Also the ballasting was necessary to complete this condition, because we carried combative troops on board, and

(Testimony of Herman Barter.)

with damaged cargo landing facilities, if the ship was damaged sufficiently, she wasn't near so apt to turn over. In other words, she would set in the water and give the maximum number of troops a chance to get over side. So that was a military characteristic we required in the APA.

Another thing——

Q. May I interrupt you, Commander: This double compartment feature that you have described, was that to be found in ordinary commercial cargo vessels?

A. I would say no, or in ordinary transports.

Q. Now, I interrupted you, Commander. Will you proceed with the characteristics in these vessels?

A. Another characteristic that was required in this vessel, [67] certain cargo space was set aside and arranged to carry sufficient troop equipment that would sustain the troops probably for the first three or four days. In addition to that, troop munitions, the amount was specified, troop gasoline for their vehicles was specified to be below the water line and separated one from the other, the munitions in the prow of the ship, and we had the gasoline in the after end of the ship, so if we had underwater damage we wouldn't have munitions and gasoline in the same place.

Q. Were those vessels built in such manner as to accommodate this particular problem of stowage that you have described?

A. Yes. In addition, these vessels—we specified



(Testimony of Herman Barter.)

what we call a ready munitions space where the troops usually were ready before dawn, and this was a small space that would give them the ready munition that they would carry on their person prior to unloading what we refer to as their cargo munition.

These ships also had built into them something we had not had before, as a result of prior operations and recommendations of the division commanders and people who had been in the operations, we built in and specified a message center.

The Court: A what?

A. A message center. That is an army term, particularly a space designated and specified where they would central to one point, if they were confused or lost. We had not had that prior to this particular group of vessels. [68]

Q. (By Mr. Pentz): Were there other characteristics of these vessels that we are speaking of, different from the ordinary cargo vessels?

A. I would say that all of the characteristics of these particular vessels were different from cargo vessels, because these were not cargo vessels, they were transports.

Q. Well, I have in mind the particular characteristics of these vessels; for example, let me ask you with regard to facilities for generating electric power. Was there anything about this type of vessel in this lawsuit that was specially built in that category?

A. Yes.

Q. What was that characteristic?



(Testimony of Herman Barter.)

A. Due to the armament I have previously mentioned, the 40-millimeter twins and quads, they were all electrically operated and required additional generators to carry the load, the top side load of these guns. Of course, these vessels were outfitted to carry approximately between 14 and 15 hundred troops. In addition to that, they had a Navy crew of around 450. This was required to man the guns that were top side, the heavy armament that we had on them. They were also required for the boat crews for the landing craft. And we had built in these vessels a galley and mess facilities to accommodate over two thousand men, which in addition entailed refrigeration space to carry the food for that number of men. [69]

And these vessels, this particular group, we were able to get much better accommodations, because we specified the lay-out, or could supervise the lay-out, because the keels had not even been laid when we first started thinking about these. For example, we were able to put a great number of troops on the main deck by building a bunk house on the main deck. In the ships that were already in being, many times we had had to put bunk rooms well below the water line, and attempt to force air down to them for ventilation. In these vessels it was just the opposite. I think we had the best of accommodations for the troops on this particular type of vessel that we had on any of them that I know of.

Q. Now, Commander, did you have occasion in your official capacity in the office of the Chief of

(Testimony of Herman Barter.)

Naval Operations, United States Navy, to personally inspect and board any of the vessels of the type covered by this lawsuit?

A. Yes. I made a trip out to California or out to the West Coast in August of 1944. I came up from the south. I was aboard the first vessel out of Cal Ship. I was aboard the 204.

Q. Now, the 204 is which ship?

A. It is the first vessel out of Permanente.

Q. In other words, that is one of the particular vessels covered by this litigation?

A. Yes. I was also aboard the 157, which was the first ship [70] completed by Vancouver-Kaiser, Vancouver.

Mr. Pentz: No further questions.

### Cross-Examination

By Mr. Walkup:

Q. Commander, during the war it is true, is it not, that the Navy had a certain amount of control over all ships that were sailing—that is, all American merchant ships had, under the Navy requirements, to have certain armament on them, gun crews, and certain features of that type because of war conditions?

A. I can answer that. I am familiar with the officer that put armament on a few merchant vessels, if that is what you are referring to. His name is Cleve. He was right across the hall from me, and I think I am familiar with the way he operated, or

(Testimony of Herman Barter.)

the way the office of Naval Operations operated under that condition, if that is what you mean.

Q. Let us take the Victory ships, the EC-2 and the VC-2—those are the designations for Victory ships, are they not?

A. EC-2 and VC-2—there are two types of victories—three types of C-2's; one was the EC-2, or the emergency cargo, the other was a straight C-2, and then the Maritime Commission brought out what they referred to as the VC-2.

Q. Now, the EC-2, the emergency cargo ship, that was known as the liberty ship?

A. Correct.

Q. Then came the straight C-2? [71]

A. Yes.

Q. Then what we knew as the Victory Cargo ship, the VC-2? A. Yes.

Q. Now, on the EC-2 and on the VC-2, and on the C-2, is it not true that the Navy Department required a certain amount of armament because of wartime conditions?

A. The Navy Department Chief of Naval Operations specified a certain armament on merchant ships, and furnished what they called armed guard crews, but that armament depended upon the zone of operation. It wasn't the same for every ship, and I don't believe every ship was armed. It depended upon the zone of operation. For example, the Murmansk, the Murmansk Zone was known as the hottest, and the vessels were convoyed and the Navy did attempt to give them armament and did attempt

(Testimony of Herman Barter.)

to give them men, and again there were zones—oh, for example, the West Coast of South America, there was practically little effort put into ships plying down there. So the guns simply depended upon the area in which the ship might be going, and some of them were left unarmed.

Q. Now, in the case of the VC-2, the Victory Cargo ship, being in the office that you were in at that time, you were familiar, were you not, with the fact that the plans and specifications of those victory cargo ships were made by the Maritime Commission with the assistance of a naval architect in the Navy by the name of George Sharp, and that the Navy made [72] certain recommendations to the Maritime Commission as to what armament should be on the cargo ships?

A. As a straight cargo ship, that is my memory, although I still again say that the armament depended upon the area of operation. They might have some, they might have none.

Q. As far as the Navy requirements of your office were concerned, then, they would vary with the field of operation for a particular ship, a particular type of ship, and also in extent as to various types of ships, dependent upon their intended use?

A. As cargo ships, that is correct.

Q. Now, the basic hull for these vessels involved in this litigation was the VC-2 hull, was it not?

A. That is correct.

Q. And the design for the VC-2 hull was a Mari-



(Testimony of Herman Barter.)

time Commission design with the assistance of George Sharp, the Naval Architect in the Navy?

A. The hull and the machinery, that is correct.

Q. Then the Navy Department, according to your testimony, recommended some additional features because of the particular use intended for these APA's?

A. I don't quite agree with that. When I said that the basic hull and the machinery were designed by George Sharp, yes. I am talking about the outside hull now, and just certain structure inside. We took the basic hull and put in [73] platforms, bulkheads, built cabins, spaces, staterooms, and, as I say, the—when I referred to the troop and munition cargo space, that was a compartment built well below the water line, that had nothing to do with the hull that George Sharp had designed. I refer to the two-compartment ship. That was accomplished—in a cargo vessel the economical load depends upon your cargo holds, and light wood. Now, for example, the cargo vessel might have a hold comparable to this court room, and to make it a two-compartment ship we would have to build a wall or bulkhead right through the middle of it, because this space would be of such size that if it were flooded the ship would sink. And I know these vessels were the—the basic hull and engines were the same, but the other features, the additional bulkhead, additional platforms, additional decks, additional—well, what we call outfitting up to carry over two thousand persons—fourteen hundred troops, a crew of 450, plus 87



(Testimony of Herman Barter.)

officers. With the facilities and the compartmentation, it was obviously a different ship. The total hull was the same up to the deck line, but——

Q. Commander, you say “we put in these changes.” By that you mean the Navy Department recommended or required these changes in the basic hull, you don’t mean that the Navy actually installed them itself, do you?

A. No, I don’t mean that. By that I mean that the Navy took the basic hull plan, the deck lay-out of the ship that [74] George Sharp designed and was under contract by the Maritime Commission—it was just like taking the floor plan for hotel rooms and putting in walls here and leaving them out there, if necessary, and so forth—the Navy was in conference with the Maritime Commission and recommended, suggested, and approved what they wanted.

Q. Yes, that was my point. But you of your own knowledge know that these vessels were actually constructed in Maritime Commission shipyards on the West Coast?      A. I know that.

Q. And do you know of your own knowledge that the final working drawings and plans that were used in the shipyards were prepared by the Maritime Commission and by George Sharp?

A. The preliminary plans were prepared in the Maritime Commission in Washington, and were submitted to George Sharp for detail; that is correct. Along that line there is nothing unusual about that. The Maritime Commission built APA Number

(Testimony of Herman Barter.)

one and APA Number eleven right down here in Southern California, and the Navy had nothing to do with them until they were delivered to them. That was the "Thalen" and the "Doyen" by name. There is nothing unusual about the Maritime Commission building a ship for the Navy.

Q. Now, the Navy itself maintains certain naval shipyards, does it not? A. Correct. [75]

Q. (Continuing): —where the building operation is a naval operation? A. Correct.

Q. (Continuing): —such as the Mare Island and possibly the Hunters Point Yards?

A. Oh, yes.

Q. And in those particular yards the plans and specifications for the vessels are prepared by the Navy completely?

A. Not necessarily. I know that George Sharp prepared a lot of plans for strictly naval vessels. A vessel starting with an "A" is an auxiliary. That "APA" means auxiliary personnel attack, and I know that George Sharp actually prepared plans that were used to build, oh, perhaps destroyers or other vessels of that type. The Navy does not prepare all its plans.

Q. I didn't make myself clear. George Sharp is a consulting architect, who is available to anyone who wants to hire him and pay him his fee, is he not?

A. That is right, both the Maritime Commission and the Navy Department.

Q. That is right. Now, as far as the construction

(Testimony of Herman Barter.)

of naval vessels at Mare Island goes, isn't it true that the Navy prepares its own plans or specifications with or without the assistance of some consultant such as George Sharp, and as to those plans, the Maritime Commission has nothing to do with the [76] plans and specifications prepared, the Navy has its own shipbuilding technicians independent of the Commission?

A. Oh, yes, that is correct, but I still go back that the Maritime Commission prepared the plans for the APA 1 and 11, the "Boyen" and the "Thalen," in a like manner, which were Navy vessels.

Q. Now, does the VC-2 basic hull conform to the naval requirements for naval vessels that are designed for combat?

A. The basic hull, no. The basic hull, that was the reason it was changed to be a Navy vessel, built in so that that hull—that ship would be a combatant vessel, have a chance to survive in combat.

Q. It is true, is it not, that the Navy requirements for a vessel which is designed for a combative vessel are much more stringent as to construction than the requirements for the basic hull of the VC-2?

A. That is correct. That is the reason that we required the design to be built like that. The basic hull—the outside dimension of a hull is what I consider basic hull—was of such strength as to hold it together, but these other features had to be built into these ships to make them suitable for the duty.

(Testimony of Herman Barter.)

They had to have a chance to survive in combat, and also with the heavy armament that we put on the top side, they required strengthening to support the guns and all that we had put on—the ready munitions box, the additional weight [77] we put top side.

Q. Is it not true, even with the modifications that were made at the suggestion of the Navy Department, the basic hull even as modified would still not comply with the naval requirements for a combatant vessel?

A. Yes, in this type of vessel it was the best we had.

Q. That is right, but it was basically a cargo vessel, it wouldn't meet Naval standards for combatant vessels?

A. As I say, these were the best combatant transports that we had, in my opinion, because we had a chance to build into these ships, because the contracts had not been let, the keels had not been laid—build into these ships features we considered necessary to make the vessel the best transport ships we had, or could get. In other words, these were the 1945 model.

Q. Do you know of your own knowledge the proportion that the Naval conversion features of these APA's bore to the total cost of the vessel?

A. No, I wouldn't be in a position to give that.

Q. Are the Navy shipbuilding standards the same as the American Bureau of Shipbuilding standards?



(Testimony of Herman Barter.)

A. I cannot answer that. I don't imagine—that would be an opinion, of course——

Q. Are you sufficiently familiar with the Navy standards for ship construction to know that there is a detailed [78] calculation of every member of the vessel in order to meet the Navy requirements for requisite strength and minimum weight?

A. Well, I certainly have the knowledge that there are detailed calculations of the strength and minimum weight of everything that goes into the construction of anything, whether it is a Navy vessel or it is the San Francisco Bridge.

Q. My point is this, Commander: During this emergency ship construction program, these very detailed and fine requirements that go into a Navy combat vessel were not put into the Victory cargo ships that were constructed in such mass production in the Maritime Commission yards, were they?

A. I was on duty at the office of Chief of Naval Operations for the four years during the war. Had I been on duty in one of the yards that were building ships in detail, I could probably answer that. I do know from personal knowledge that a lot of the rules had to be excepted—I mean, where we had certain standards we had to reduce those standards because of materials available and other conditions, whether it was a Navy vessel or anything else. That was done through the war.

I know on critical materials we accepted or we authorized to accept lower standards than we would in peace time perhaps. That would be beyond our control.



(Testimony of Herman Barter.)

Mr. Walkup: That is all. [79]

### Cross-Examination

By Mr. Collett:

Q. I would like to ask a few questions, if the Court please. Do you have any interest in this litigation, Commander? A. No.

Q. Are you a friend of the plaintiff, Mr. Birnie?

A. Yes. Oh, the plaintiff? No.

The Court: Mr. Birnie.

A. No, I am certainly not a friend of Mr. Birnie.

Q. (By Mr. Collett): Is he an acquaintance of yours?

A. I have seen him once in my life.

Q. Have you discussed the matter of your testimony with counsel for the plaintiff in this case?

A. Oh, yes.

Q. You have. Have you ever been in actual operations during the course of the war?

A. In this war I wasn't in combat for the reason of my physical disability. When I was ordered—before I was ordered for duty I reported for physical examination, I was to be put in Class A, B, or C. Class A was duty anywhere, anyplace; Class B was shore duty any place; Class C was shore duty only in the United States. The doctors placed me in Class C, and I spent the war in the Office of the Chief of Naval Operations in Washington.

Q. You say you were in the office of the Chief of Naval [80] Operations from the first of July, 1941, to——

(Testimony of Herman Barter.)

A. To the first of October, 1945.

Q. During that time did you have under your personal supervision the specifications as to the construction on all AK's and AP's?

A. Specifications, no, but the directing and establishing of military characteristics, yes. It was up to the Bureau of Ships to give us the specifications, to give us what we wanted. In other words, we specified the military characteristics, a certain type of guns, a certain number of guns, a certain type of equipment, a certain amount of landing craft, the double compartmentation, the ballasting, any special features that were military characteristics my office specified, but the Bureau of Ships gave us the specifications to give us what we wanted. The features were specified, and how they were put in the ships was up to the Bureau of Ships.

Q. What was your personal specific assignment and duty in the office with regards to specifications?

A. I was assigned to the division of the Office of Chief of Naval Operations known as Op 23. My desk was Op 23-E and later Op 23-E-1. Does that answer your question?

Q. What did you do as Op 23-E-1?

A. Well, as Op 23-E-1, in 1941, Op 23 was the cognizance desk for all naval auxiliaries, whether they were AP's, AO's, AK's, AC's, or whatnot. That desk also functioned for the [81] Chief of Naval Operations for the development of ship-borne landing craft—this was in 1941. I had been a member of the Naval Board for the testing of

(Testimony of Herman Barter.)

landing craft in 1939, when we made the original tests to get the best design. When I reported for duty in the office of the Chief of Naval Operations, then whatever correspondence or decisions or co-ordination or procurement of ships for landing craft fell to me as a part of that auxiliary desk. As the war developed, I was the Chief of Naval Operations member on the landing craft developing board, which was all ship-borne landing craft. I was the Secretary of the Navy member of the LVT Board from its beginning until the end of the war. That Board had the development of all amphibian tractors, like the alligators and water buffaloes.

In addition to the responsibility of my desk, my responsibility was advanced planning and procuring of landing craft, ship-borne and LVT's, to meet operation required, and in that I specified to the Bureau of Ships the monthly production of landing craft, both ship-borne and LVT's, that were to be built. I specified—do you want me to go into all this?

Q. Well——

A. You asked me what I did.

Q. I don't want to cut you off, Commander.

A. You asked me what I did.

Q. I think I asked you to get your particular assignment, [82] I think you have practically answered it. I will restate it now. Your assignment was concerned actually with landing craft, is that so?

A. All kinds of landing craft, from the LCN's

(Testimony of Herman Barter.)

to the LSD's, which was the largest, all APA's, AKA's, AGC's, LSV's, which was the old mine-layers that we could not do anything with and finally converted them to landing craft. In addition to the landing craft, I was the desk for the APA's—as the war progressed and one man or one desk could not handle all the naval auxiliaries, we branched out, and I took on the combative boats, another officer took on the amphibian tractors, another officer was assigned to the AKA's, et cetera.

Q. Now, if we take the landing of Attu, for instance, and the type of transports that were used at Attu, that had previously crossed your desk, had it not?

A. Yes, sir, and the one that sank up there, the "Middleton," I know all about that.

Q. You knew the "Middleton"?

A. Oh, yes.

Q. As far as the "Middleton," what armament did the "Middleton" have on her?

A. As I recall—of course, you must know that up to the first hundred APA's, ships that were later designated APA's, if you are familiar with that, we must have had 35 or 40 different types, and they were given numbers. The "Middleton," [83] I believe, was given the 20, and the APA's maybe 27, 26, something like that, and as I recall she had two five-inch guns, I think—I may be wrong on this—but this was about the best we could do at that time when we outfitted her. I believe two five-inch guns,



(Testimony of Herman Barter.)

I believe she had the one twin, one quad, two of them; because of the critical situation we could not get 40 millimeters; she carried landing craft, and I believe she had four whaling davits, two on each side. She was a ship that was already in being, as I recall, and we took over and did the best we could with her. We had three of that class.

Q. Now, as the war progressed from the first amphibian landing, the requirements to use landing craft and get troops ashore finally caused you to consider different specifications that went into the transport cargo ships, in order that they might perform their functions?

A. Characteristics. And I received my information through battle reports of operations, secret reports of fleet commanders or the commander responsible for the reports, they came across my desk—I mean all landing types, I don't mean the others, I mean the ship-borne landing types came across my desk *carte blanche*, as soon as a report came in and came to my desk, and in that way people in the fleet either praised the material or criticized and they pointed out the deficiencies of the equipment and what should be done about it, [84] and it was up to me to coordinate this information, and, if humanly possible, to eliminate some of the difficulties that were found in operations, and certainly as the war progressed every report was scrutinized and that was the reason that I said that this particular group of APA's, starting with 117, the VC-2 hull, was the absolute ultimate. It had the best anti-



(Testimony of Herman Barter.)

aircraft batteries—by that time the materials had become available, more plants were making them, the Russians and British were asking for them for lend-lease, and we had a chance to actually build into these ships—from the time the keel was laid—built into them what had been recommended to eliminate deficiencies that the forces and the fleet had reported to us in the months of the war.

Q. At that time you had had the advance of Saipan, the Marshalls, and of New Guinea and Leyte, the invasion of Leyte in the Philippines, and these ships were probably anticipated for use in the invasion of Japan; is that so?

A. These ships were designed for use in the advance and ultimate invasion of Japan. As I recall, Mr. Wanless of the Advanced Design of the Bureau of Ships, the first lay-out that he presented to me, as an example, had two five-inch guns on the stern, had a five-inch gun on the bow, because that was all we had been having in the anti-submarine armament, and the first change I made on that was to remove the five-inch in the bow and put a 40 millimeter quad up there, because we [85] expected more trouble from Kamikaze, I knew they were going to advanced islands, getting closer to the Japanese home base and Japanese planes, and these are the first ships we ever had quarter covered by a 40 millimeter twin, in addition to the quad on the bow.

But that was the result of knowing where these

(Testimony of Herman Barter.)

ships were going to operate and knowing what was needed from the reports of the commanders.

Q. To sum up, as all these ships came over to you the specifications were there, they were already specified from previous experiments and from the battle reports in the meantime, and the succeeding changes in specifications were the result of changes in the tactics in the war with the Japanese, as the advance on Japan was being made the biggest threats to the transports was the submarine, so you put a five-inch gun in the bow and maybe something else, but from the time of Leyte where you were getting closer to Japan, and with the practical destruction of the Japanese fleet, the submarine was no longer a threat, so you took one five-inch gun off the bow and you put some of the quads and the 40 millimeters, and the reason for that was because at that time the Japanese had no particular effective fleet, and it was more important to defend the ship from enemy aircraft than from submarines?

A. That is right, and that was one of the features we [86] included and were able to get.

Q. That was your function in regard to the specifications?

A. I call them military characteristics.

Q. Well, you performed the natural functions that your office was performing, to see that any ships gotten out were best equipped and designed to perform the function which they were going to be used for?

A. That is correct.

Mr. Collett: That is all.

(Testimony of Herman Barter.)

Mr. Pentz: That is all.

Mr. Walkup: Your Honor, I have located a reference to the deposition; I think I should ask a couple of more questions, if I may.

The Court: Yes.

### Further Cross-Examination

By Mr. Walkup:

Q. Commander, are you qualified to tell us the meaning of the designation VC-2-S?

A. I believe so. VC-2 is Victory Cargo 2; S is steam, and it is my understanding that the VC-2 design, the C-2 meant a ship of certain dimensions, a certain—approximate certain cargo capacity. Now, the straight C-2—I mean the VC-2, the difference between the VC-2 and the C-2 is in a little finer lines, capacity about the same, but with the horsepower of the C-3, which gave the C-2 a greater speed, the VC-2 a greater speed than the straight C-2. [87]

Q. Now, referring to Plaintiff's Exhibit C, which is Addendum Number 2, Contract MCc-15762, the particular ships I referred to as design VC-2-S-AP5. You say that the V stands for Victory ship?

A. That is my understanding.

Q. The C stands for cargo vessel?

A. A cargo-type vessel of a certain capacity and dimensions, yes.

Q. And the 2 means, does it not, between 400 and 450 feet long, or do you know?

(Testimony of Herman Barter.)

A. I believe that is about right, yes.

Q. And the S refers to steam propulsion?

A. That is my memory, yes.

Q. And the propulsion of these APA's was the same as in all of the Victory cargo ships, was it not? There was no different engines put in them?

A. Oh, no; oh, no, they had the basic C3 engines. The horsepower of the—the C-3 was a larger cargo vessel and had larger engines to give them a certain speed. It was my understanding that in this design the Maritime Commission fined the hull down a bit—by “fining” I mean taking some of the beam out—and I think used larger engines, which gave the vessels an additional horsepower over a straight C-2, which would give it more speed than a straight C-2.

Q. Now, it is true, then, is it not, that there were the [88] same engine facilities in the cargo vessels as in these APA's, which was the modification of the cargo vessel with some naval features?

A. Well, I think I stated before it was my understanding the basic hull and engines—and I mean basic hull, which means the outside structure—I don't mean the interior arrangement and engines—were the same, but, as I pointed out, there was additional generator capacity required, additional refrigerator capacity required, the galley facilities, messing facilities, double compartmentation, ballasting, and all that built in and specified in these vessels.